16A Am. Jur. 2d Constitutional Law VII A Refs.

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VII. Departmental Separation of Governmental Powers

A. In General

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Research References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 2330 to 2333, 2350, 2390, 2470, 2540, 2580 to 2599, 2621 to 2625
West's Key Number Digest, States 4.1(2)

A.L.R. Library

A.L.R. Index, Constitutional Law
A.L.R. Index, Separation of Powers
A.L.R. Index, States
A.L.R. Index, Supremacy Clause
A.L.R. Index, United States
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VII. Departmental Separation of Governmental Powers

A. In General

§ 234. Principle of separation of powers, generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 2330

The defining principle of constitutional governments in the United States at both the national and state levels is a separation of powers.[1] A fundamental principle of the American constitutional system is that governmental powers are divided among three separate and independent branches: legislative, executive, and judicial.[2] The separation of powers doctrine provides that a department may not exercise powers not so constitutionally granted which from their essential nature do not fall within its division of governmental functions unless those powers are properly incidental to performing its own appropriate functions.[3] Thus, the doctrine ensures that the three branches of government are distinct unto themselves and that they, exclusively, exercise the rights and responsibilities reserved to them.[4] The separation of powers in the federal government does not depend on the views of individual presidents, nor on whether the encroached-upon branch approves the encroachment.[5] It is the duty of the judicial department—in a separation-of-powers case as in any other—to say what the law is, but it is equally true that the longstanding practice of the government can inform the judicial department's determination of what the law is.[6]

Footnotes

1 State v. Sturgis, 947 A.2d 1087 (Del. 2008).

2 Nye v. Katsilometes, 165 Idaho 455, 447 P.3d 903 (2019); Golden v. Paterson, 23 Misc. 3d 641, 877 N.Y.S.2d 822 (Sup 2008); State v. Head, 971 S.W.2d 49 (Tenn. Crim. App. 1997); City of Spokane v. County of Spokane, 158 Wash. 2d 661, 146 P.3d 893 (2006).

3 Hawaii Insurers Council v. Lingle, 120 Haw. 51, 201 P.3d 564 (2008).

4 Simpson v. West Virginia Office of Ins. Com'r, 223 W. Va. 495, 678 S.E.2d 1 (2009).

5 Free Enterprise Fund v. Public Co. Accounting Oversight Bd., 561 U.S. 477, 130 S. Ct. 3138, 177 L. Ed. 2d 706 (2010).

6 N.L.R.B. v. Noel Canning, 573 U.S. 513, 134 S. Ct. 2550, 189 L. Ed. 2d 538 (2014).

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VII. Departmental Separation of Governmental Powers

A. In General

§ 235. Distribution of power among departments of government

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 2330, 2332

The separation-of-powers principle distributes the authority to make law to the legislature, the authority to execute law to the executive, and the authority to interpret law to the judiciary.[1] However, the doctrine should not be understood as precluding some degree of functional overlap between and among the three departments of government,[2] and the separation-of-powers doctrine thus allows for some interplay between the branches of government.[3] The branches of government cannot always be neatly divided, and common sense must be applied when reviewing a separation of powers challenge.[4] Under a state constitution's separation of powers clause, the rule of separation of governmental powers cannot always be rigidly applied, since the state government is not divided in any such way that all acts of the nature of the functions of one department can never be exercised by another department; such a division is impracticable, and if carried out would result in the paralysis of government.[5]

The doctrine of separation of powers is based upon the longstanding recognition that the powers of the three branches of government—judicial, legislative, and executive—are coequal and distinct from one another,[6] each charged with performing particular functions;[7] as such, the branches should be kept separate, distinct, and independent of one another.[8] The separation of powers doctrine prohibits judicial review of the discretionary acts of other branches of government.[9]

The Federal Constitution confers limited authority on each branch of the federal government.[10] Each branch of government exercises the powers appropriate to its own department, and no branch can encroach upon the powers confided to the others; this system prevents the accumulation of all powers, legislative, executive, and judiciary, in the same hands, an accumulation

that would pose an inherent threat to liberty.[11] The Federal Constitution grants legislative power to Congress; the United States Supreme Court and the lower federal courts, by contrast, have only "judicial Power."[12]

Footnotes

1 News and Observer Pub. Co. v. Easley, 182 N.C. App. 14, 641 S.E.2d 698 (2007).
In general, the "legislative power" is the authority to make, order, and repeal law, the "executive power" is the authority to administer and enforce law, and the "judicial power" is the authority to interpret and apply law. Colonial Pipeline Co. v. Morgan, 263 S.W.3d 827 (Tenn. 2008).

2 In re Request for Advisory Opinion from House of Representatives (Coastal Resources Management Council), 961 A.2d 930 (R.I. 2008).
Blending and overlapping of powers, generally, see § 242.

3 Burrowes v. Killian, 459 P.3d 1082, 2020 WL 1467030 (Wash. 2020).

4 Dry Harbor Nursing Home v. Zucker, 175 A.D.3d 770, 108 N.Y.S.3d 467 (3d Dep't 2019).

5 State v. McCleese, 333 Conn. 378, 215 A.3d 1154 (2019).

6 Powder River County v. State, 2002 MT 259, 312 Mont. 198, 60 P.3d 357 (2002); Vapor Technology Association v. Cuomo, 66 Misc. 3d 800, 118 N.Y.S.3d 397, 2020 WL 239128 (N.Y. Sup 2020); Com. v. Morris, 565 Pa. 1, 771 A.2d 721 (2001).

7 Vapor Technology Association v. Cuomo, 66 Misc. 3d 800, 118 N.Y.S.3d 397, 2020 WL 239128 (N.Y. Sup 2020).

8 Powder River County v. State, 2002 MT 259, 312 Mont. 198, 60 P.3d 357 (2002); Com. v. Morris, 565 Pa. 1, 771 A.2d 721 (2001).
As to independence of the separate departments, generally, see §§ 240, 241.

9 Nye v. Katsilometes, 165 Idaho 455, 447 P.3d 903 (2019).

10 Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 194 L. Ed. 2d 635 (2016), as revised, (May 24, 2016).

11 Patchak v. Zinke, 138 S. Ct. 897, 200 L. Ed. 2d 92 (2018) (per Justice Thomas, with three Justices concurring, and two Justices concurring in the judgment).

12 Hernandez v. Mesa, 140 S. Ct. 735 (2020).

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VII. Departmental Separation of Governmental Powers

A. In General

§ 236. Importance and purpose of principle of separation of powers

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 2330 to 2332

Under the constitutional separation of powers, no branch of government organized under the constitution may exercise any power that is not explicitly bestowed by the constitution or that is not essential to the exercise of that power.[1] The separation of powers doctrine serves a dual function: it limits the exercise of power within each branch, yet ensures the independent exercise of that power.[2] Although the purpose of the doctrine is to create a system of checks and balances[3] so that each branch maintains its integrity and independence, the three branches need not be entirely separate and distinct.[4] While there may be a blending of powers in certain respects,[5] the purpose of the doctrine is to define the core powers of the three branches of government and prevent unwarranted infringement by one upon another's core powers.[6]

The primary purpose of the doctrine is to prevent the commingling of different powers of government in the same hands.[7] The doctrine is premised on the belief that too much power in the hands of one governmental branch invites corruption and tyranny,[8] and thus, the doctrine prevents one branch of government from aggrandizing itself or encroaching upon the fundamental functions of another.[9] The separation of powers precludes any one governmental branch from aggregating unchecked authority that might lead to oppression and despotism.[10]

The separation of powers doctrine is fundamental to a state's tripartite system of government and must be strictly construed.[11] It is an immutable constitutional principle that must be strictly enforced.[12]

The dynamic between and among the branches is not the only object of the Constitution's concern; the structural principles secured by the separation of powers protect the individual as well.[13] Individuals are protected by the operations of constitutional separation of powers and checks and balances, and they are not disabled from relying on those principles in otherwise justiciable cases and controversies.[14]

When a party seeks to assert an implied cause of action under the Constitution itself, just as when a party seeks to assert an implied cause of action under a federal statute, separation-of-powers principles are, or should be, central to the analysis.[15]

CUMULATIVE SUPPLEMENT

Cases:

Separation of powers does not require that the branches of government be hermetically sealed off from one another; the different branches must remain partially intertwined if for no other reason than to maintain an effective system of checks and balances. Colvin v. Inslee, 467 P.3d 953 (Wash. 2020).

[END OF SUPPLEMENT]

Footnotes

1 Washington v. Commissioner of Correction, 287 Conn. 792, 950 A.2d 1220 (2008).

2 Alaska Public Interest Research Group v. State, 167 P.3d 27 (Alaska 2007); Whitaker v. Commissioner of Correction, 90 Conn. App. 460, 878 A.2d 321 (2005).
Independence of the separate departments, see §§ 240, 241.

3 State v. Yishmael, 456 P.3d 1172 (Wash. 2020).

4 In re J.D., 172 Ohio App. 3d 288, 2007-Ohio-3279, 874 N.E.2d 858 (10th Dist. Franklin County 2007).

5 § 242.

6 California Correctional Peace Officers Assn. v. State of California, 142 Cal. App. 4th 198, 47 Cal. Rptr. 3d 717 (1st Dist. 2006), as modified on denial of reh'g, (Sept. 13, 2006).
The separation of powers doctrine is not intended to prohibit one branch from taking action properly within its sphere that has the incidental effect of duplicating a function or procedure delegated to another branch. Coastside Fishing Club v. California Resources Agency, 158 Cal. App. 4th 1183, 71 Cal. Rptr. 3d 87 (1st Dist. 2008).

7 State v. McCleese, 333 Conn. 378, 215 A.3d 1154 (2019).

8 State v. Baxter, 686 N.W.2d 846 (Minn. Ct. App. 2004).

9 In re Detention of Savala, 147 Wash. App. 798, 199 P.3d 413 (Div. 3 2008).

10 State v. A.T.C., 239 N.J. 450, 217 A.3d 1158 (2019).

11 Elk Horn Coal Corp. v. Cheyenne Resources, Inc., 163 S.W.3d 408 (Ky. 2005).
The section of the state constitution which prohibits any one department of the state government from exercising the powers of the others is not merely a suggestion; it is part of the fundamental law of the state, and as such, it must be strictly construed and closely followed. Simpson v. West Virginia Office of Ins. Com'r, 223 W. Va. 495, 678 S.E.2d 1 (2009).

12 Interest of P. T., 353 Ga.App. 511, 2020 WL 486323 (Ga. Ct. App. 2020).

13 Ziglar v. Abbasi, 137 S. Ct. 1843, 198 L. Ed. 2d 290 (2017); Department of Transp. v. Association of American Railroads, 575 U.S. 43, 135 S. Ct. 1225, 191 L. Ed. 2d 153 (2015); Bond v. U.S., 564 U.S. 211, 131 S. Ct. 2355, 180 L. Ed. 2d 269 (2011).

The constitutional system divides power into many different hands in order to protect liberty. State v. Yishmael, 456 P.3d 1172 (Wash. 2020).

14 Bond v. U.S., 564 U.S. 211, 131 S. Ct. 2355, 180 L. Ed. 2d 269 (2011).

15 Ziglar v. Abbasi, 137 S. Ct. 1843, 198 L. Ed. 2d 290 (2017) (addressing a *Bivens* claim).

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VII. Departmental Separation of Governmental Powers

A. In General

§ 237. Separation of powers as express or implied constitutional requirement

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 2330

The doctrine of separation of powers is not expressly stated in the United States Constitution, or in the constitutions of a number of states, including Kansas,[1] Ohio,[2] Washington,[3] and Wisconsin.[4] The Federal Constitution, however, creates three branches of government and vests each branch with a different type of power,[5] Furthermore, there appears in a state constitution an express division of the powers of government among the three departments; states whose constitutions expressly provide for the separation of powers include Arizona,[6] California,[7] Illinois,[8] Indiana,[9] Maine,[10] Maryland,[11] Massachusetts,[12] Michigan,[13] Missouri,[14] Nebraska,[15] New Mexico,[16] New Jersey,[17] Oklahoma,[18] South Dakota,[19] and Virginia.[20]

Observation:

A state constitutional provision that a person belonging to one department cannot exercise the powers properly belonging to another is to be strictly applied.[21]

Footnotes

1 State ex rel. Morrison v. Sebelius, 285 Kan. 875, 179 P.3d 366 (2008) (the doctrine is recognized as an inherent and integral element of the republican form of government).

2 State v. Sterling, 113 Ohio St. 3d 255, 2007-Ohio-1790, 864 N.E.2d 630 (2007) (the doctrine is inherent in the constitutional framework of the government).

3 Brown v. Owen, 165 Wash. 2d 706, 206 P.3d 310 (2009) (the very division of the state government into different branches is presumed to give rise to the doctrine).
The separation of powers doctrine implicitly arises from the tripartite democratic form of government and recognizes that the executive, legislative, and judicial branches of government have their own unique powers and duties that are separate and apart from the others. State v. Mann, 146 Wash. App. 349, 189 P.3d 843 (Div. 3 2008).

4 State v. Stenklyft, 2005 WI 71, 281 Wis. 2d 484, 697 N.W.2d 769 (2005) (the doctrine is implicit in the division of governmental powers among the judicial, legislative, and executive branches).

5 Patchak v. Zinke, 138 S. Ct. 897, 200 L. Ed. 2d 92 (2018) (per Justice Thomas, with three Justices concurring, and two Justices concurring in the judgment).

6 Cactus Wren Partners v. Arizona Dept. of Bldg. and Fire Safety, 177 Ariz. 559, 869 P.2d 1212 (Ct. App. Div. 1 1993).

7 California School Boards Assn. v. State of California, 171 Cal. App. 4th 1183, 90 Cal. Rptr. 3d 501 (3d Dist. 2009).

8 People v. Bryant, 278 Ill. App. 3d 578, 215 Ill. Dec. 355, 663 N.E.2d 105 (1st Dist. 1996).

9 Mitchell v. Randolph, 215 F.3d 753 (7th Cir. 2000).

10 New England Outdoor Center v. Commissioner of Inland Fisheries and Wildlife, 2000 ME 66, 748 A.2d 1009 (Me. 2000).

11 Christ by Christ v. Maryland Dept. of Natural Resources, 335 Md. 427, 644 A.2d 34 (1994).

12 Com. v. Tate, 34 Mass. App. Ct. 446, 612 N.E.2d 686 (1993).

13 People v. Raihala, 199 Mich. App. 577, 502 N.W.2d 755 (1993).

14 Dabin v. Director of Revenue, 9 S.W.3d 610 (Mo. 2000), as modified on denial of reh'g, (Feb. 8, 2000).

15 State v. Philipps, 246 Neb. 610, 521 N.W.2d 913 (1994).

16 State ex rel. Taylor v. Johnson, 1998-NMSC-015, 125 N.M. 343, 961 P.2d 768 (1998).

17 New Jersey State Bar Ass'n v. State, 387 N.J. Super. 24, 902 A.2d 944 (App. Div. 2006).

18 In re Initiative Petition No. 341, State Question No. 627, 1990 OK 53, 796 P.2d 267 (Okla. 1990).

19 Gray v. Gienapp, 2007 SD 12, 727 N.W.2d 808 (S.D. 2007).

20 Taylor v. Worrell Enterprises, Inc., 242 Va. 219, 409 S.E.2d 136 (1991).

21 Local 170, Transport Workers Union of America, C.I.O. v. Gadola, 322 Mich. 332, 34 N.W.2d 71 (1948); State ex rel. State Bldg. Commission v. Bailey, 151 W. Va. 79, 150 S.E.2d 449 (1966).

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VII. Departmental Separation of Governmental Powers

A. In General

§ 238. Application of separation of powers requirement to local governments

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 2330

The separation of powers requirement generally does not apply to local county and municipal governments,[1] including townships.[2] Indeed, the separation of powers doctrine is a concept foreign to municipal governance.[3] Although some separation of functions is intended under the mayor-council plan of government, the doctrine of separation of powers is not generally applicable to the mayor-council plan of government.[4]

Footnotes

1 In re Danielle W., 207 Cal. App. 3d 1227, 255 Cal. Rptr. 344 (2d Dist. 1989); Bradford v. Pappillion, 207 S.W.3d 841 (Tex. App. Houston 14th Dist. 2006).
The Rhode Island Constitution does not guarantee, or even implicate, separation of powers considerations at the municipal level. Moreau v. Flanders, 15 A.3d 565 (R.I. 2011).
The Pennsylvania Constitution does not articulate a requirement that local, municipal governments have a separation of powers and specifically provides that electors can determine for themselves what form of local government they wish. City Council, City of Reading v. Eppihimer, 835 A.2d 883 (Pa. Commw. Ct. 2003).

2 Armstrong v. Ypsilanti Charter Township, 248 Mich. App. 573, 640 N.W.2d 321 (2001).

3 Moreau v. Flanders, 15 A.3d 565 (R.I. 2011).

4 DeSoto v. Smith, 383 N.J. Super. 384, 891 A.2d 1241 (App. Div. 2006).

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VII. Departmental Separation of Governmental Powers

A. In General

§ 239. Practical difficulties in separation of powers

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 2330, 2332

Although the dividing lines among the three branches are sometimes indistinct and are probably incapable of any precise definition,[1] the principle of separation of powers forbids any branch from exercising the functions exclusively committed to another branch.[2] However, the separation of powers doctrine is grounded in flexibility and practicality and will rarely offer a definitive boundary beyond which one branch may not tread.[3] Rather than mandating strict separation between the branches of government, the separation of powers doctrine protects each branch against overreaching by the others.[4] Each of the three divisions of the government must be protected from encroachment by the others, so that its integrity and independence may be preserved.[5]

Historically, what constitutes executive, legislative, or judicial power has been determined in the light of the common law and what the powers were considered to be when the constitution was adopted.[6] The dividing lines between the respective powers of the three departments is generally determined on a case-by-case basis[7] by a consideration of the language and intent of the constitution as well as of the history, the nature, and the powers, limitations, and purposes of the republican form of government established and maintained under the federal and state constitutions.[8]

Footnotes

1 Jubelirer v. Rendell, 598 Pa. 16, 953 A.2d 514 (2008).

2 Jubelirer v. Rendell, 598 Pa. 16, 953 A.2d 514 (2008); League of Women Voters of Wisconsin v. Evers, 2019 WI 75, 387 Wis. 2d 511, 929 N.W.2d 209 (2019).

3 Carrick v. Locke, 125 Wash. 2d 129, 882 P.2d 173 (1994).

4 Jett v. City of Tucson, 180 Ariz. 115, 882 P.2d 426 (1994).

5 State v. Sterling, 113 Ohio St. 3d 255, 2007-Ohio-1790, 864 N.E.2d 630 (2007).

6 Petition of Florida State Bar Ass'n for Adoption of Rules for Practice and Procedure, 155 Fla. 710, 21 So. 2d 605, 158 A.L.R. 699 (1945).

7 McDonnell v. Juvenile Court in and for Second Judicial Dist., 864 P.2d 565 (Colo. 1993) (determining whether a court has intruded into the sphere of the executive branch requires a case-by-case evaluation).

8 Florida Motor Lines v. Railroad Com'rs, 100 Fla. 538, 129 So. 876 (1930).

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VII. Departmental Separation of Governmental Powers

A. In General

§ 240. Independence of separate departments

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 2330, 2332

To ensure that each branch's power remains independent from influences by the other branches of government, each department possesses the inherent power to administer its own affairs and perform its duties, so as not to become a subordinate branch of the government.[1] Each of the three governmental branches possesses its own unique sphere of authority that cannot be exercised by another branch.[2] Thus, each branch of government has a core zone of exclusive authority into which the other branches may not intrude.[3] Separation of powers principles are violated when the activity of one branch threatens the independence or integrity or invades the prerogatives of another.[4]

The doctrine limits the authority of one of the three branches of government to arrogate to itself the core functions of another branch.[5] In these core areas, any exercise of authority by another branch of government is unconstitutional.[6] However, the doctrine of separation of powers does not preclude the prosecution of members of the executive, legislative, and judicial branches for violations of the law,[7] nor does it bar prosecution of former members of the three branches when appropriate.[8]

The completeness of the separation of the three departments and their mutual independence does not extend to the point that those in authority in one department can ignore and treat the acts of those in authority in another department, done pursuant to the authority vested in them, as void, of no effect, and not binding on every department of the government.[9] Moreover, one department may have limited, lawful control over the other departments as is illustrated by the power of the chief executive to practically annul the judgments of the judiciary in certain cases through the exercise of the pardoning power[10] and the power of the chief executive to nullify the actions of the legislature through the use of the veto.[11]

Footnotes

1 Halverson v. Hardcastle, 123 Nev. 245, 163 P.3d 428 (2007).

2 California School Boards Assn. v. State of California, 171 Cal. App. 4th 1183, 90 Cal. Rptr. 3d 501 (3d Dist. 2009); South 51 Development Corp. v. Vega, 335 Ill. App. 3d 542, 269 Ill. Dec. 731, 781 N.E.2d 528 (1st Dist. 2002); State v. Yishmael, 456 P.3d 1172 (Wash. 2020).

3 State v. Chvala, 2003 WI App 257, 268 Wis. 2d 451, 673 N.W.2d 401 (Ct. App. 2003).

4 State v. Yishmael, 456 P.3d 1172 (Wash. 2020).

Although mandamus review is generally a matter within the state Supreme Court's discretion, the court's place in a government of separated powers requires it to consider also the priorities of the other branches of government. In re McAllen Medical Center, Inc., 275 S.W.3d 458 (Tex. 2008).

5 Marine Forests Society v. California Coastal Com., 36 Cal. 4th 1, 30 Cal. Rptr. 3d 30, 113 P.3d 1062 (2005).

6 State v. Jensen, 2004 WI App 89, 272 Wis. 2d 707, 681 N.W.2d 230 (Ct. App. 2004), decision aff'd, 2005 WI 31, 279 Wis. 2d 220, 694 N.W.2d 56 (2005).

7 U.S. v. Rose, 28 F.3d 181 (D.C. Cir. 1994) (in pursuing an Ethics in Government Act suit against a congressman, the Department of Justice was fulfilling its constitutional responsibilities and not encroaching on Congress, and thus its action in bringing suit did not offend the separation of powers doctrine).

8 U.S. v. Kolter, 71 F.3d 425 (D.C. Cir. 1995) (the separation of powers doctrine did not prohibit the prosecution of a former congressman for embezzlement and conversion of public funds even though the theory of the indictment required the court to distinguish between "official" and "personal" purchases as those terms were used in House Rules).

9 First Federal Savings & Loan Ass'n of Wisconsin v. Loomis, 97 F.2d 831, 121 A.L.R. 99 (C.C.A. 7th Cir. 1938).

10 Arnett v. Meredith, 275 Ky. 223, 121 S.W.2d 36, 119 A.L.R. 1183 (1938).

Pardoning power as vesting in the executive branch, generally, see Am. Jur. 2d, Pardon and Parole § 15.

11 Veto power and its exercise, generally, see Am. Jur. 2d, Statutes §§ 30 to 35.

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16A Am. Jur. 2d Constitutional Law § 241

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VII. Departmental Separation of Governmental Powers

A. In General

§ 241. Independence of separate departments—Shared powers; cooperation

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 2330, 2332

In designing the structure of government and dividing and allocating the sovereign power among the three coequal branches, the Framers of the Constitution sought to provide a comprehensive system, but the separate powers were not intended to operate with absolute independence.[1] Although when the constitution commits a matter to one branch of government, the constitution prohibits the other branches from invading that sphere or interfering with the coordinate branch's exercise of its authority,[2] shared powers of the branches of government lie at the intersections of their exclusive core constitutional powers and are not confined to any one branch; the branches may exercise authority within these intersections but may not unduly burden or substantially interfere with another branch.[3]

Thus, separation of powers does not require that the branches of government be hermetically sealed off from one another;[4] the doctrine of separation requires a cooperative accommodation among the three branches of government;[5] a rigid and inflexible classification of powers would render government unworkable.[6] The separation of powers doctrine has no rigid boundaries, and instead, some acts can be properly entrusted to more than one branch of government, and some functions inevitably intersect; when this happens, harmonious cooperation among the three branches of government becomes fundamental to the system of government.[7] Although there should ideally be a cooperative accommodation among the three branches of government, and a spirit of comity encourages cooperation between the branches in furtherance of mutual goals, comity has limits because constitutional separation of powers does not permit one branch to usurp the essential power of another.[8]

In particular, a branch of government cannot deny to another the funds necessary for it to operate and perform its constitutional functions.[9]

Footnotes

1 U.S. v. Young, 541 F. Supp. 2d 1226 (D.N.M. 2008).

2 In re Civil Commitment of Giem, 742 N.W.2d 422 (Minn. 2007).

3 State v. Schell, 2003 WI App 78, 261 Wis. 2d 841, 661 N.W.2d 503 (Ct. App. 2003).

4 State v. Yishmael, 456 P.3d 1172 (Wash. 2020).

5 State v. A.T.C., 239 N.J. 450, 217 A.3d 1158 (2019).

6 In re Advisory Committee on Professional Ethics Opinion 705, 192 N.J. 46, 926 A.2d 839 (2007).
The separation of powers doctrine should be flexibly interpreted to encourage a cooperative accommodation among the three governmental branches, and their powers should be viewed as being complementary. Bullet Hole, Inc. v. Dunbar, 335 N.J. Super. 562, 763 A.2d 295 (App. Div. 2000).

7 Klouda v. Sixth Judicial Dist. Dept. of Correctional Services, 642 N.W.2d 255 (Iowa 2002).

8 In re Petition of New Hampshire Bar Ass'n, 151 N.H. 112, 855 A.2d 450 (2004).

9 State in Interest of A.C., 643 So. 2d 719 (La. 1994), on reh'g, 643 So. 2d 743 (La. 1994) (the doctrine of inherent powers confers upon the courts the power to do all things reasonably necessary for exercising their functions as courts, and another branch of government cannot, by denying resources or authority to the courts, prevent them from carrying out their constitutional responsibilities as independent branch of government).
The Alabama Governor acted unconstitutionally in imposing a 5% proration on appropriations for the judiciary without considering whether the remaining appropriations were adequate and reasonable to allow the judiciary to perform its constitutionally mandated duties. Folsom v. Wynn, 631 So. 2d 890 (Ala. 1993).

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VII. Departmental Separation of Governmental Powers

A. In General

§ 242. Blending or overlapping of powers of separate departments

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 2330 to 2333, 2350, 2390, 2470, 2540, 2580 to 2599, 2621 to 2625

In actual practice there is some overlap between the powers of the various branches of government, and separation of powers of government has never existed in pure form except in political theory.[1] The focus of a separation of powers inquiry is not whether one branch of government is exercising certain powers that may in some way pertain to another branch but whether the power exercised so encroaches upon another branch's power as to usurp from that branch its constitutionally defined function.[2] When considering if there has been a violation of the constitutional separation of powers doctrine, a court must examine the specific facts and circumstances presented and search for a usurpation by one branch of government of the powers of another branch of government.[3] The doctrine does allow for some degree of functional overlap between and among the three departments of government,[4] and one branch of government may engage in functions that intervene in or overlap with the functions of another branch so long as it does not undermine the operation of that other branch or undermine the rule of law that all branches are committed to maintain.[5] Many officers' duties cannot be exclusively placed under any one of the branches.[6]

Authority has been usurped, for purposes of the constitutional separation of powers doctrine, when one branch of government interferences significantly with the operations of another branch.[7] In determining whether one branch has usurped another's power, the court should consider the essential nature of the power being exercised; the degree of control by one department over another; the objective sought to be attained by the legislature; and the practical result of the blending of powers as shown by actual experience over a period of time.[8] Although the separation of powers doctrine means that the whole power of one branch of government should not be exercised by the same hands that possess the whole power of either of the other branches,[9] the separation of powers prohibition is directed only to those powers that belong exclusively to a single branch of government.[10] A headless "fourth branch" of government has been described, consisting of independent agencies having significant duties in

both the legislative and executive branches but residing not entirely within either, for purposes of determining whether those agencies may exercise both legislative and executive powers.[11]

CUMULATIVE SUPPLEMENT

Cases:

Emergency orders enacted by Governor in response to COVID-19 pandemic, including closures of certain businesses and of schools, did not interfere with legislative functions and thus did not violate separation of powers; because Civil Defense Act provided authority for Governor's issuance of orders, Governor was executing the laws by issuing the orders, and issuance of the orders did not deprive legislature of ability to enact pieces of legislation to address pandemic. Mass. Const. pt. 1, art. 30. Desrosiers v. Governor, 486 Mass. 369, 158 N.E.3d 827 (2020).

[END OF SUPPLEMENT]

Footnotes

1 Breedlove v. State, 310 Kan. 56, 445 P.3d 1101 (2019).

2 Hunter v. State, 177 Vt. 339, 2004 VT 108, 865 A.2d 381 (2004).
If a Massachusetts statute impermissibly allocates a power held by only one branch to another, it violates the Separation of Powers Clause under the State's Declaration of Rights. Com. v. Cole, 468 Mass. 294, 10 N.E.3d 1081 (2014).

3 State ex rel. Morrison v. Sebelius, 285 Kan. 875, 179 P.3d 366 (2008).

4 In re Request for Advisory Opinion from House of Representatives (Coastal Resources Management Council), 961 A.2d 930 (R.I. 2008).

5 In re Mowery, 141 Wash. App. 263, 169 P.3d 835 (Div. 1 2007), as amended, (Nov. 8, 2007).

6 Guiseppi v. Walling, 144 F.2d 608, 155 A.L.R. 761 (C.C.A. 2d Cir. 1944), judgment aff'd, 324 U.S. 244, 65 S. Ct. 605, 89 L. Ed. 921 (1945); Bailey v. State Bd. of Public Affairs, 1944 OK 301, 194 Okla. 495, 153 P.2d 235 (1944).
Administrative agencies may combine, to a certain extent, the functions of all three departments of government. In re Request for Advisory Opinion from House of Representatives (Coastal Resources Management Council), 961 A.2d 930 (R.I. 2008).

7 State ex rel. Morrison v. Sebelius, 285 Kan. 875, 179 P.3d 366 (2008).

8 State v. Donald, 198 Ariz. 406, 10 P.3d 1193 (Ct. App. Div. 1 2000); State v. Beard, 274 Kan. 181, 49 P.3d 492 (2002).
The separation of powers provision of the Texas Constitution is violated when (1) one branch of government assumes a power properly attached to another branch or (2) one branch unduly interferes with another branch effectively exercising its constitutionally assigned powers; the first type of violation has to do with a usurpation of one branch's powers by another branch, and the second type concerns the frustration or delay of one branch's powers by another branch. Rushing v. State, 50 S.W.3d 715 (Tex. App. Waco 2001), petition for discretionary review refused, (1 pet.)(Feb. 6, 2002) and petition for discretionary review granted, (1 pet.) (Feb. 6, 2002) and judgment aff'd, 85 S.W.3d 283 (Tex. Crim. App. 2002).

9 In re C.H.W., 26 Kan. App. 2d 413, 988 P.2d 276 (1999).
Separation of powers doctrine, generally, see § 234.

10 State v. Palmer, 791 So. 2d 1181 (Fla. 1st DCA 2001).

11 Ameron, Inc. v. U.S. Army Corps of Engineers, 787 F.2d 875 (3d Cir. 1986), on reh'g, 809 F.2d 979 (3d Cir. 1986) (the General Accounting Office is viewed as a good example of such an agency).

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VII. Departmental Separation of Governmental Powers

A. In General

§ 243. Blending or overlapping of powers of separate departments—Federal government

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 2330 to 2333

The separation of powers doctrine has never been strictly applied to all the ramifications of the national government, and there are many instances in which powers or functions have blended or overlapped. For example, acting in a quasi-judicial role, the President can create administrative tribunals[1] and may perform certain other judicial acts under the Constitution, such as creating courts-martial, and also disapproving and setting aside their findings and punishment;[2] creating military commissions to try individuals for violations of the laws of war;[3] and prescribing the manner of death for violation of a federal statute calling for the death penalty.[4]

By promulgating administrative rules and regulations, the President may have the effect of legislating, and these promulgations have the force and effect of law unless overturned by the courts or Congress. For instance, the United States Sentencing Commission whose members are appointed by the President may prescribe the manner of serving criminal sentences. In doing so, the Commission is not inappropriately engaged in the promulgation of legislation in violation of the doctrine of separation of powers.[5] Also, the President is made a part of the legislative power in that the President's assent is required to the enactment of all statutes and resolutions of Congress. This, however, is so only to a limited extent, for a bill may become a law despite the refusal of the President to approve it, by an override vote of two-thirds of each house of Congress.[6] The President's power of executing the laws[7] necessarily includes both authority and responsibility to resolve some questions left open by Congress that arise during the law's administration, but it does not include a power to revise clear statutory terms that turn out not to work in practice.[8] Furthermore, a President who takes measures incompatible with the expressed or implied will of Congress can rely only upon the President's own constitutional powers, minus any constitutional powers of Congress over the matter; to succeed in such measures, the President's asserted power must be both exclusive and conclusive on the matter.[9]

The President may, on extraordinary occasions, convene both Houses of Congress or either of them, and, in the case of disagreement between them with respect to the time of adjournment, may adjourn them to a time that the President deems proper.[10] Furthermore, the Vice President of the United States is the President of the Senate and may vote in cases when the Senate is evenly divided.[11]

The Senate is made a participant in the functions of appointing officers and making treaties, which are supposed to be properly executive functions, by requiring the Senate's consent to the appointment of those officers[12] and the ratification of treaties,[13] and although the President is made the commander in chief of the Army and Navy of the United States,[14] the Constitution vests in the Congress the sole power to declare war[15] and further provides that the Congress has the authority to raise and support armies.[16]

The Senate also exercises the judicial power of trying impeachments,[17] and the House of Representatives exercises the power of preferring articles of impeachment.[18] Congress may, moreover, suspend the writ of habeas corpus in cases of rebellion or invasion if the public safety requires it.[19]

Footnotes

1 Railway Labor Executives' Ass'n v. Skinner, 934 F.2d 1096 (9th Cir. 1991).

2 Runkle v. U.S., 22 Ct. Cl. 487, 122 U.S. 543, 7 S. Ct. 1141, 30 L. Ed. 1167 (1887).

3 Ex parte Quirin, 317 U.S. 1, 63 S. Ct. 2, 87 L. Ed. 3 (1942), order modified on other grounds, 63 S. Ct. 22 (1942).

4 U.S. v. Tipton, 90 F.3d 861 (4th Cir. 1996) (the Attorney General has the constitutional and statutory authority to provide by regulation that death sentences imposed for murder in furtherance of a continuing criminal enterprise will be carried out by lethal injection).

5 U.S. v. Griffith, 85 F.3d 284 (7th Cir. 1996).

6 U.S. Const. Art. I, § 7.

7 U.S. Const. Art. II, § 3.

8 Utility Air Regulatory Group v. E.P.A., 573 U.S. 302, 134 S. Ct. 2427, 189 L. Ed. 2d 372 (2014).

9 Zivotofsky ex rel. Zivotofsky v. Kerry, 576 U.S. 1, 135 S. Ct. 2076, 192 L. Ed. 2d 83 (2015).

10 U.S. Const. Art. II, § 3.

11 U.S. Const. Art. I, § 3.

12 Ryder v. U.S., 515 U.S. 177, 115 S. Ct. 2031, 132 L. Ed. 2d 136 (1995) (the Federal Constitution's Appointments Clause [U.S. Const. Art. II, § 2, cl. 2] is a bulwark against one branch of the federal government aggrandizing its power at the expense of another branch; moreover, the Appointments Clause preserves another aspect of the Constitution's structural integrity by preventing the diffusion of the appointment power).

13 U.S. Const. Art. II, § 2.

14 U.S. Const. Art. II, § 2.

15 U.S. Const. Art. I, § 8.

16 U.S. Const. Art. I, § 8.

17 U.S. Const. Art. I, § 3.

18 U.S. Const. Art. I, § 2.

19 U.S. Const. Art. I, § 9.

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VII. Departmental Separation of Governmental Powers

A. In General

§ 244. Blending or overlapping of powers of separate departments—State government

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 2330 to 2333

The state constitutions blend the powers of government to some extent, despite declarations in bills of rights to the contrary.[1] Although the function of ascertaining facts based on evidence taken in the course of a formal hearing is normally associated with the exercise of judicial power, it may be entirely proper in the exercise of legislative or executive power and may be accompanied by the authority to compel the attendance of witnesses and the power to punish for contempt.[2] Similarly, although it is normally the duty of the legislature to make the determinations of fact on the basis of which legislation is to become effective, that duty may properly be devolved on members of the executive branch.[3] Also, under the provisions of most state constitutions, although the legislative authority of the state is vested in a senate and house of representatives (or general assembly), the lawmaking power includes control or supervision by the governor to the extent the governor has the authority to approve or veto legislation.[4]

Footnotes

1 Dreyer v. People of State of Illinois, 187 U.S. 71, 23 S. Ct. 28, 47 L. Ed. 79 (1902).

2 In re Battelle, 207 Cal. 227, 277 P. 725, 65 A.L.R. 1497 (1929).

3 Parker v. Riley, 18 Cal. 2d 83, 113 P.2d 873, 134 A.L.R. 1405 (1941).

4 Doyle v. Hofstader, 257 N.Y. 244, 177 N.E. 489, 87 A.L.R. 418 (1931) (in New York, the lawmaking department is not the legislature alone but the legislature and the governor).

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VII. Departmental Separation of Governmental Powers

A. In General

§ 245. Effect of Federal Constitution on separation of state governmental powers

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West's Key Number Digest

West's Key Number Digest, Constitutional Law 2330
West's Key Number Digest, States 4.1(2)

The Constitution of the United States does not, in terms, prohibit one department of the government of a state from exercising the powers that are conferred on either of the other departments,[1] nor does the Constitution impose the doctrine of separation of powers upon the states.[2] In fact, as a matter of Federal constitutional law, the states are free to allocate the lawmaking function to whatever branch of state government they may choose.[3] as long as they do not violate the Federal Constitution,[4] and this extends to a state's choice as to how the powers of local government are to be arranged.[5] It is up to the state to determine whether the legislative, executive, and judicial powers of a state are kept altogether distinct and separate, or whether persons or collections of persons belonging to one department may, in respect of some matters, exert powers that, strictly speaking, pertain to another department of government.[6] The blending of the powers of different departments in the same official does not violate the guaranty of a republican form of government.[7] The Fourteenth Amendment leaves the states free to distribute the powers of their government as they will between their legislative and judicial branches,[8] and a state constitution may unite certain legislative and judicial powers in a single person without violating the Federal Constitution.[9]

Footnotes

1 State v. Brill, 100 Minn. 499, 111 N.W. 294 (1907).

2 Mayor of City of Philadelphia v. Educational Equality League, 415 U.S. 605, 94 S. Ct. 1323, 39 L. Ed. 2d 630 (1974); Consolidated Edison Co. of New York, Inc. v. Pataki, 292 F.3d 338 (2d Cir. 2002).
The concept of separation of powers embodied in the United States Constitution is not mandatory in state governments. Ralbovsky v. Kane, 407 F. Supp. 2d 1142 (C.D. Cal. 2005), aff'd, 227 Fed. Appx. 691 (9th Cir. 2007).

3 Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 101 S. Ct. 715, 66 L. Ed. 2d 659 (1981).

4 City Council, City of Reading v. Eppihimer, 835 A.2d 883 (Pa. Commw. Ct. 2003).

5 City Council, City of Reading v. Eppihimer, 835 A.2d 883 (Pa. Commw. Ct. 2003).

6 Sweezy v. State of N.H. by Wyman, 354 U.S. 234, 77 S. Ct. 1203, 1 L. Ed. 2d 1311 (1957); La Guardia v. Smith, 288 N.Y. 1, 41 N.E.2d 153 (1942).

7 § 681.

8 Hughes v. Superior Court of Cal. in and for Contra Costa County, 339 U.S. 460, 70 S. Ct. 718, 94 L. Ed. 985, 57 Ohio L. Abs. 298 (1950).

9 O'Donoghue v. U.S., 289 U.S. 516, 53 S. Ct. 740, 77 L. Ed. 1356 (1933).

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VII. Departmental Separation of Governmental Powers

B. Executive Powers

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Research References

West's Key Number Digest

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West's Key Number Digest, International Law 161
West's Key Number Digest, United States 250

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VII. Departmental Separation of Governmental Powers

B. Executive Powers

1. In General

§ 246. Executive powers, generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 2620

The executive power is the power to execute the laws, that is, to carry them into effect, as distinguished from the authority to make the laws and the power to judge them.[1] The executive power within the meaning of separation of powers provision encompasses the responsibility to carry out and enforce the laws, that is, to administrate.[2] Promulgating rules and regulations is thus an executive function.[3] Due to the separation of powers, the President cannot choose to bind his or her successors by diminishing their powers, nor escape responsibility for his or her choices by pretending that they are not his or her own.[4]

The federal power to make necessary laws is in Congress; the power to execute them is in the President.[5] National-security policy, in particular, is the prerogative of both the Congress and President.[6] Even with respect to matters of national security, however, there are limitations on the power of the Executive under Article II of the Constitution, and in the powers authorized by congressional enactments.[7]

The executive power includes the power of appointment, removal, supervision, and management.[8] The power of appointment is intrinsically and historically an executive function[9] although the right to make appointments to public office may, under certain circumstances, be exercised in whole or in part by other departments, as in jurisdictions where state constitutions do not vest the appointment power as an exclusive function of any single department.[10]

The executive power need not, in all cases, be exercised directly and exclusively by the chief executive, but may be, in some instances, and most frequently is, delegated to subordinates.[11]

Footnotes

1 State for Use of Dept. of Corrections v. Pena, 911 P.2d 48 (Colo. 1996); State v. Beard, 274 Kan. 181, 49 P.3d 492 (2002); Halverson v. Hardcastle, 123 Nev. 245, 163 P.3d 428 (2007); Bourquin v. Cuomo, 85 N.Y.2d 781, 628 N.Y.S.2d 618, 652 N.E.2d 171 (1995); Richardson v. Tennessee Bd. of Dentistry, 913 S.W.2d 446 (Tenn. 1995).
Once a sentence is imposed, the executive branch holds the power and responsibility of executing it. Com. v. Cole, 468 Mass. 294, 10 N.E.3d 1081 (2014).
The executive branch of a state government has the power and responsibility to enforce the laws as enacted and interpreted by the other two branches. Weiss v. Maples, 369 Ark. 282, 253 S.W.3d 907 (2007).
The executive branch is charged with implementation of the policy expressed in law by the legislature. Snow v. Office of Legislative Research and General Counsel, 2007 UT 63, 167 P.3d 1051, 224 Ed. Law Rep. 447 (Utah 2007).

2 Halverson v. Hardcastle, 123 Nev. 245, 163 P.3d 428 (2007).

3 McNeil-Terry v. Roling, 142 S.W.3d 828 (Mo. Ct. App. E.D. 2004).
The authority of an administrative or executive department to make rules and regulations to carry out an expressed legislative purpose or for the complete operation and enforcement of a law within designated limitations, is administrative in its nature, and its use by administrative officers is essential to the complete exercise of the powers of all departments. Schumacher v. Johanns, 272 Neb. 346, 722 N.W.2d 37 (2006).

4 Free Enterprise Fund v. Public Co. Accounting Oversight Bd., 561 U.S. 477, 130 S. Ct. 3138, 177 L. Ed. 2d 706 (2010).

5 Medellin v. Texas, 552 U.S. 491, 128 S. Ct. 1346, 170 L. Ed. 2d 190 (2008).

6 Ziglar v. Abbasi, 137 S. Ct. 1843, 198 L. Ed. 2d 290 (2017).

7 Ziglar v. Abbasi, 137 S. Ct. 1843, 198 L. Ed. 2d 290 (2017).

8 California Assn. of Retail Tobacconists v. State of California, 109 Cal. App. 4th 792, 135 Cal. Rptr. 2d 224 (4th Dist. 2003).

9 Daly v. Hemphill, 411 Pa. 263, 191 A.2d 835 (1963).
For discussion of the appointment to public office as an executive function, see Am. Jur. 2d, Public Officers and Employees § 90.

10 Sedlak v. Dick, 256 Kan. 779, 887 P.2d 1119 (1995); In re Application of Oklahoma Dept. of Transp., 2003 OK 105, 82 P.3d 1000 (Okla. 2003).
Appointment to public office as a legislative function, see Am. Jur. 2d, Public Officers and Employees § 91.

11 § 309.

16A Am. Jur. 2d Constitutional Law § 247

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VII. Departmental Separation of Governmental Powers

B. Executive Powers

1. In General

§ 247. Prosecutorial function of executive department

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West's Key Number Digest

West's Key Number Digest, Constitutional Law 2392, 2545(4), 2620

Law Reviews and Other Periodicals

Sawyer, Reform Prosecutors and Separation of Powers, 72 Okla. L. Rev. 603 (2020)

The prosecution of crime is an executive function and the duty of the executive department is to enforce the criminal laws.[1] The executive branch determines whom to prosecute and what to charge.[2] That is, the executive branch has the exclusive authority and absolute discretion to decide whether to prosecute a case.[3] Prosecutorial discretion is an inherent executive power for purposes of the constitutional separation of powers.[4]

Further, the executive power includes the authority to issue pardons[5] and reprieves[6] and to grant or revoke paroles.[7]

Footnotes

1 Flynt v. Com., 105 S.W.3d 415 (Ky. 2003).

2 State v. Suhon, 742 N.W.2d 16 (Minn. Ct. App. 2007).

The executive branch has the exclusive authority not only to decide whether to prosecute but also to decide which of alternative statutory sections that may carry penalties of varying severity the defendant will be charged with violating. U.S. v. Sanchez, 517 F.3d 651 (2d Cir. 2008).

3 U.S. v. Traficant, 368 F.3d 646, 2004 FED App. 0146P (6th Cir. 2004).

The prosecutorial function is an executive branch function, and a prosecutor's independence is founded in part on the principle of separation of powers. People v. Parmar, 86 Cal. App. 4th 781, 104 Cal. Rptr. 2d 31 (3d Dist. 2001).

4 Polikov v. Neth, 270 Neb. 29, 699 N.W.2d 802 (2005).

5 State v. Stenklyft, 2005 WI 71, 281 Wis. 2d 484, 697 N.W.2d 769 (2005).

Persons and bodies authorized to grant pardons, see Am. Jur. 2d, Pardon and Parole §§ 15 to 21.

6 U.S. v. Williams, 15 F.3d 1356, 1994 FED App. 0037P (6th Cir. 1994).

The judiciary and the legislature may not assume a power of clemency or pardon which is a unique function of executive power. Moreau v. Fuller, 276 Va. 127, 661 S.E.2d 841 (2008).

7 U.S. v. Fryar, 920 F.2d 252 (5th Cir. 1990) (parole revocation is an executive function).

Intrusions by the judiciary into the executive branch's realm of parole matters may violate the separation of powers. In re Lugo, 164 Cal. App. 4th 1522, 80 Cal. Rptr. 3d 521 (1st Dist. 2008).

The executive branch has inherent and primary authority over parole matters, and within that branch, the Board of Prison Terms is an executive parole agency that is an arm of the Department of Corrections. In re Roberts, 36 Cal. 4th 575, 31 Cal. Rptr. 3d 458, 115 P.3d 1121 (2005), as modified, (Aug. 24, 2005).

The executive branch alone has the authority to place conditions on parole and, as a general rule, a trial court cannot order a parole condition. Ceballos v. State, 246 S.W.3d 369 (Tex. App. Austin 2008), petition for discretionary review refused, (June 25, 2008).

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VII. Departmental Separation of Governmental Powers

B. Executive Powers

1. In General

§ 248. Foreign policy functions of executive department; role of legislative department

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 2620
West's Key Number Digest, International Law 161

Foreign affairs is a domain in which the controlling role of the political branches is both necessary and proper.[1] The conduct of the foreign relations of the United States is committed by the Constitution to the executive and the legislative—the political—departments of the government.[2] The President has the authority to recognize a foreign government.[3] The admission and exclusion of foreign nationals is a fundamental sovereign attribute exercised by the federal government's political departments and largely immune from judicial control.[4] The ultimate decision to extradite a fugitive to a foreign country is a matter within the exclusive prerogative of the executive branch in the exercise of its powers to conduct foreign affairs.[5]

Footnotes

1 Bank Markazi v. Peterson, 136 S. Ct. 1310, 194 L. Ed. 2d 463 (2016).

2 Anderman v. Federal Republic of Austria, 256 F. Supp. 2d 1098 (C.D. Cal. 2003).
The conduct of foreign relations is committed largely to the executive branch, with power in the legislative branch, to, among other things, ratify treaties with foreign sovereigns. Greenberg v. Bush, 150 F. Supp. 2d 447 (E.D. N.Y. 2001).

3 U.S. v. Belmont, 301 U.S. 324, 57 S. Ct. 758, 81 L. Ed. 1134 (1937) (executive recognition of Russian soviet republic was operative and gave validity to previous acts of that republic); Security Pac. Nat. Bank v. Government and State of Iran, 513 F. Supp. 864 (C.D. Cal. 1981) (the power is absolute and exclusive). The President is empowered to recognize the government of a foreign state and this authority is not confined to the act of recognition. U.S. v. Arlington County, Va., 669 F.2d 925 (4th Cir. 1982).

4 Trump v. Hawaii, 138 S. Ct. 2392, 201 L. Ed. 2d 775 (2018).

5 In re Extradition of Ramos Herrera, 268 F. Supp. 2d 688 (W.D. Tex. 2003).

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VII. Departmental Separation of Governmental Powers

B. Executive Powers

2. Limitations with Regard to Judicial Department

§ 249. Limitations of executive power with regard to judicial authority, generally; independence of judiciary

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 2620, 2623

A judiciary free from control by the executive and the legislature is essential if there is a right to have claims decided by judges who are free from potential domination by other branches of government.[1] It is the duty of the other branches of government to facilitate the administration of justice by the judiciary.[2]

Observation:

Although, for purposes of constitutional separation of powers, the distinction between the executive and judicial powers is often unclear, they do differ: the executive department has the general power to execute and carry out the laws while the judicial department has the authority to interpret the constitution and laws, apply them, and decide controversies.[3]

Footnotes

1 Larabee v. Governor of State, 65 A.D.3d 74, 880 N.Y.S.2d 256 (1st Dep't 2009), aff'd as modified on other grounds, 14 N.Y.3d 230, 899 N.Y.S.2d 97, 925 N.E.2d 899 (2010).
The municipal court had inherent authority to manage and control court employees, and the city's interference with that authority violated constitutional principle of separation of powers; the city could therefore be subject to a preliminary injunction prohibiting it from exercising any authority over municipal court employees, including their selection, promotion, or termination. City of Sparks v. Sparks Mun. Court, 129 Nev. 348, 302 P.3d 1118, 129 Nev. Adv. Op. No. 38 (2013).

2 State ex rel. Judges of Toledo Mun. Court v. Mayor of Toledo, 179 Ohio App. 3d 270, 2008-Ohio-5914, 901 N.E.2d 321 (6th Dist. Lucas County 2008).

3 Doe v. State, 688 N.W.2d 265 (Iowa 2004).

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VII. Departmental Separation of Governmental Powers

B. Executive Powers

2. Limitations with Regard to Judicial Department

§ 250. Particular restrictions of executive power with regard to judicial authority

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 2620, 2623, 2625(2)

Executive officers cannot exercise judicial powers or functions,[1] or usurp them,[2] such as by passing upon the constitutionality of legislation,[3] amending or modifying court orders,[4] or sentencing criminals.[5]

Executive officers cannot interfere with the courts[6] or prevent them from exercising their inherent judicial functions.[7] Accordingly, the President cannot dictate to the judiciary what law to apply or how to interpret the applicable law.[8]

Footnotes

1 People ex rel. Madigan v. Snyder, 208 Ill. 2d 457, 281 Ill. Dec. 581, 804 N.E.2d 546 (2004).
The action of a district attorney in filing an information is not an exercise of a judicial power or function. Manduley v. Superior Court, 27 Cal. 4th 537, 27 Cal. 4th 887a, 117 Cal. Rptr. 2d 168, 41 P.3d 3 (2002), as modified, (Apr. 17, 2002).

2 Doe v. State, 688 N.W.2d 265 (Iowa 2004).
A governor's clemency orders did not usurp the authority of or interfere with the judiciary's sentencing powers. People ex rel. Madigan v. Snyder, 208 Ill. 2d 457, 281 Ill. Dec. 581, 804 N.E.2d 546 (2004).

3 State v. Sproles, 672 N.E.2d 1353 (Ind. 1996) (the Department of State Revenue has no authority to strike down a tax statute).

A local executive official charged with the ministerial duty of enforcing a statute does not have the authority to disregard the terms of the statute in the absence of a judicial determination that it is unconstitutional, based solely upon the official's opinion that the statute is unconstitutional. Lockyer v. City and County of San Francisco, 33 Cal. 4th 1055, 17 Cal. Rptr. 3d 225, 95 P.3d 459 (2004).

The Rhode Island Attorney General does not have authority to determine that legislation is unconstitutional, though the Attorney General may inform the court of her opinion that a statute is flawed. National Revenue Corp. v. Violet, 807 F.2d 285 (1st Cir. 1986).

4 Gray v. Commissioner of Revenue, 422 Mass. 666, 665 N.E.2d 17 (1996) (it is an impermissible interference with judicial functions for the executive to purport to reverse, modify, or contravene a court order); Chastain v. Chastain, 932 S.W.2d 396 (Mo. 1996).

A statutory requirement that the prosecutor approve a sentence modification that occurs more than 365 days after the defendant began serving the sentence imposed by the trial court does not violate the separation of powers doctrine by allegedly divesting the judiciary of its powers. Reed v. State, 796 N.E.2d 771 (Ind. Ct. App. 2003).

5 Forbes v. Singletary, 684 So. 2d 173 (Fla. 1996) (sentencing is an obligation of the courts rather than the Department of Corrections).

Under general federalism principles, the United States Attorney's Office, as a member of the executive branch, does not have the authority to bind the U.S. Probation Office, as a member of the judiciary branch, with respect to sentencing recommendations. U.S. v. Loza-Gracia, 670 F.3d 639 (5th Cir. 2012).

The executive branch's discretion to charge an offense that carries a mandatory minimum sentence does not result in executive aggrandizement at the expense of the judiciary. U.S. v. Gagliardi, 506 F.3d 140 (2d Cir. 2007).

Instead of usurping the power of the courts, upon discovering an illegal sentence, the Department of Corrections should inform the prosecuting attorney or the sentencing court and allow the sentence to be corrected judicially rather than administratively. Frederick v. State, 23 Misc. 3d 1008, 874 N.Y.S.2d 762 (Ct. Cl. 2009).

The California death penalty law does not violate the constitutional principle of separation of powers by delegating sentencing authority to the prosecutor; the ultimate sentencing power remains at all times with the judicial branch. People v. Tafoya, 42 Cal. 4th 147, 64 Cal. Rptr. 3d 163, 164 P.3d 590 (2007).

6 People ex rel. Madigan v. Snyder, 208 Ill. 2d 457, 281 Ill. Dec. 581, 804 N.E.2d 546 (2004); State ex rel. Stenberg v. Murphy, 247 Neb. 358, 527 N.W.2d 185 (1995); In re A.M.S., 277 S.W.3d 92 (Tex. App. Texarkana 2009).

7 Gray v. Commissioner of Revenue, 422 Mass. 666, 665 N.E.2d 17 (1996); State ex rel. Karnes v. Dadisman, 153 W. Va. 771, 172 S.E.2d 561 (1970).

8 Medellin v. Texas, 552 U.S. 491, 128 S. Ct. 1346, 170 L. Ed. 2d 190 (2008).

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VII. Departmental Separation of Governmental Powers

B. Executive Powers

2. Limitations with Regard to Judicial Department

§ 251. Appointment of members to commission by executive department; Federal Sentencing Commission; service by judiciary member on executive commission

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 2623, 2625(1)

The powers conferred on the President under the Federal Sentencing Reform Act to appoint all members of the Sentencing Commission and to remove members "for cause" does not unconstitutionally prevent the judicial branch from performing its constitutionally assigned functions.[1]

Observation:

The United States Sentencing Commission is an "independent commission in the judicial branch" composed of seven voting members selected by the President with the advice and consent of the Senate. Prior to the Feeney Amendment in 2003, at least three members of the commission were to be judges selected from a list submitted to the President by the Judicial Conference of the United States, and the sentencing guidelines promulgated by the commission were mandatory. The Feeney Amendment modified

the law to state that "no more than three" members may be judges, removing all mandatory judicial input, thus allowing the President to appoint, if desired, only members of the executive branch to the commission. The Feeney Amendment to the structure of the sentencing commission was not unconstitutional on separation of powers grounds[2] under the advisory sentencing guideline regime, following the Supreme Court decision excising the requirement that the sentencing guidelines be applied mandatorily and stating that the guidelines henceforth are advisory and should be considered by sentencing courts as one of several sentencing factors.[3] The guidelines promulgated by the commission do not control sentencing, but instead recommend a range that can be modified or disregarded by a district court upon consideration of the statutory sentencing factors.[4]

The presence of a retired Supreme Court justice and an active circuit judge on a Presidential Commission to investigate organized crime does not violate the constitutional separation of powers doctrine, if the service of the judges was voluntary, judicial membership on the advisory commission did not prevent it from carrying out its duties, and participation by the judges did not disrupt the operation of the courts.[5] However, at least one court has taken a contrary position.[6]

Footnotes

1 Mistretta v. U.S., 488 U.S. 361, 109 S. Ct. 647, 102 L. Ed. 2d 714 (1989).

2 U.S. v. Coleman, 451 F.3d 154 (3d Cir. 2006).

3 U.S. v. Booker, 543 U.S. 220, 125 S. Ct. 738, 160 L. Ed. 2d 621 (2005).
Nonmandatory nature of the federal sentencing guidelines, see Am. Jur. 2d, Criminal Law § 750.

4 U.S. v. Coleman, 451 F.3d 154 (3d Cir. 2006).

5 Matter of President's Com'n on Organized Crime Subpoena of Scarfo, 783 F.2d 370 (3d Cir. 1986).

6 Application of President's Com'n on Organized Crime, 763 F.2d 1191 (11th Cir. 1985).

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VII. Departmental Separation of Governmental Powers

B. Executive Powers

2. Limitations with Regard to Judicial Department

§ 252. Actions of administrative agencies as limited by judicial authority

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 2620, 2623, 2625(1)

As a part of the executive branch of government, an administrative tribunal is not a court; it is not a part of the judicial branch of government, for purposes of the separation of powers doctrine,[1] and as a general rule, administrative agencies have no general judicial authority.[2] Thus, an administrative agency does not have the power, without statutory authority, to overrule or ignore a judicial precedent.[3] Furthermore, the reconciliation of distinct statutory regimes is a matter for the courts, not administrative agencies.[4]

Observation:

The separation of powers doctrine requires administrative agencies in the executive branch to follow the law of the federal circuit whose courts have jurisdiction over a particular cause of action, and the respective courts of appeal express the law of that circuit in the absence of a controlling decision by the United States Supreme Court.[5] In order to establish agency nonacquiescence, evidence must demonstrate that the agency has deliberately failed to follow law of the circuit whose courts have jurisdiction over the cause of action.[6] An administrative agency's obligation to follow the interpretations of statutes by the state courts does not restrict other parties to administrative proceedings from seeking review, restrict the agency from seeking the certification of important issues to the Supreme Court for resolution, or restrict the agency from seeking legislative changes.[7]

Administrative agencies may combine, to a certain extent, the functions of all three departments of government,[8] and when the exercise of quasi-judicial power by an administrative agency is incidental to the duty of administering the law in a practical and effective manner, it does not constitute an impermissible grant of judicial power.[9] An agency in the executive branch may be called upon to adjudicate disputes of a type that might ordinarily otherwise be resolved by a court and may perform those adjudicatory functions in harmony with the separation of powers doctrine, provided that there is an opportunity for judicial review of the agency's final determination.[10] The legislature's delegation to agencies of the quasi-judicial power to adjudicate rights must include an opportunity for judicial review of the administrative action.[11]

Footnotes

1 Quinton v. General Motors Corp., 453 Mich. 63, 551 N.W.2d 677 (1996).
The fact that an administrative body performs a function previously performed by a court does not automatically make it a court. Alaska Public Interest Research Group v. State, 167 P.3d 27 (Alaska 2007).

2 State ex rel. Stenberg v. Murphy, 247 Neb. 358, 527 N.W.2d 185 (1995).
When an agency's determination of a question of law has not previously been subject to judicial scrutiny, the agency is not entitled to special deference; it is for the courts, and not administrative agencies, to expound and apply governing principles of law. Trumbull Falls, LLC v. Planning and Zoning Com'n of Town of Trumbull, 97 Conn. App. 17, 902 A.2d 706 (2006).

3 Hecker v. Stark County Social Service Bd., 527 N.W.2d 226 (N.D. 1994).

4 Epic Systems Corp. v. Lewis, 138 S. Ct. 1612, 200 L. Ed. 2d 889 (2018).

5 Hyatt v. Heckler, 807 F.2d 376 (4th Cir. 1986).

6 Stieberger v. Sullivan, 738 F. Supp. 716 (S.D. N.Y. 1990).

7 Costarell v. Florida Unemployment Appeals Com'n, 916 So. 2d 778 (Fla. 2005).

8 In re Request for Advisory Opinion from House of Representatives (Coastal Resources Management Council), 961 A.2d 930 (R.I. 2008).

9 Alhambra-Grantfork Telephone Co. v. Illinois Commerce Com'n, 358 Ill. App. 3d 818, 295 Ill. Dec. 419, 832 N.E.2d 869 (5th Dist. 2005).
The separation of powers principle does not bar administrative agencies of the executive branch from working in tandem with the judicial branch to administer justice under appropriate circumstances, and administrative fact-findings are a necessary aspect of administrative discretion rather than an exclusively judicial function. Barshop v. Medina County Underground Water Conservation Dist., 925 S.W.2d 618 (Tex. 1996).

10 Maryland Aggregates Ass'n, Inc. v. State, 337 Md. 658, 655 A.2d 886 (1995).

11 Ford Motor Co. v. Motor Vehicle Review Bd., 338 Ill. App. 3d 880, 272 Ill. Dec. 883, 788 N.E.2d 187 (1st Dist. 2003).

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VII. Departmental Separation of Governmental Powers

B. Executive Powers

2. Limitations with Regard to Judicial Department

§ 253. Actions of administrative agencies as limited by judicial authority—Constitutionality of statutes, regulations

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 2623

An administrative agency does not have the authority to determine the constitutionality of statutes.[1] It is the responsibility of an administrative agency to enforce the law as enacted, while it is the responsibility of the courts to rule on constitutional challenges to a statute.[2] Further, an administrative agency cannot determine the constitutionality of any regulation it may adopt pursuant to statute; that role is reserved for the courts under the separation of powers doctrine.[3] However, there is also authority that an administrative body in a contested case proceeding may resolve questions of the unconstitutional application of a statute to specific the circumstances of the case or of the constitutionality of a rule that the agency has adopted.[4]

Footnotes

1 Piazza's Seafood World, LLC v. Odom, 6 So. 3d 820 (La. Ct. App. 1st Cir. 2008).
A statute's constitutionality should be determined by the judiciary, not an administrative board. Central Telephone Co. v. Tolson, 174 N.C. App. 554, 621 S.E.2d 186 (2005).

2 General Engines Co., Inc. v. Director, Div. of Taxation, 23 N.J. Tax 515, 2007 WL 2491849 (2007); Chase v. State, 184 Vt. 430, 2008 VT 107, 966 A.2d 139 (2008).

3 S & P Lebos, Inc. v. Ohio Liquor Control Comm., 163 Ohio App. 3d 827, 2005-Ohio-5424, 840 N.E.2d 1108 (10th Dist. Franklin County 2005).

4 Richardson v. Tennessee Bd. of Dentistry, 913 S.W.2d 446 (Tenn. 1995).

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VII. Departmental Separation of Governmental Powers

B. Executive Powers

3. Limitations with Regard to Legislative Department

§ 254. Limitations of executive power with regard to legislative authority, generally; independence of legislative department

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 2620, 2621
West's Key Number Digest, United States 250

The legislative branch of government enacts the law, the judiciary interprets those laws, and the executive branch enforces those laws until they are amended or held to be unconstitutional.[1] As between the legislative and the executive branches, the separation of powers requires that the legislature make the critical policy decisions while the responsibility of the executive branch is to implement those policies.[2] That is, the executive branch is invested primarily with the function of executing the law.[3] Accordingly, a governor has no authority to change or amend state law, as this power falls exclusively to the legislature.[4] Furthermore, a governor may not assume the function of enacting statutes, as this power is unique to the legislative function.[5]

The separation of powers doctrine precludes the executive branch, in expending public funds, from disregarding legislatively prescribed directives and limits pertaining to the use of such funds.[6] The governor has the constitutional prerogative to spend less than the full amount of an appropriation but is not free to withhold funds or otherwise fail to execute the law on the basis of views regarding the social utility or wisdom of the law; although not obliged to spend the money foolishly or needlessly, the governor may not totally negate a legislative policy decision that lies at the core of the legislative function.[7]

Observation:

The Supreme Court has explained that the central role or purpose of the Speech or Debate Clause of the Federal Constitution[8] which provides that members of Congress shall not be questioned in any other place for any speech or debate in either House, is to prevent intimidation of legislators by the executive branch.[9] The design of the Clause is to ensure that the legislative branch will be able to discharge its duties free from undue external interference from the executive and judicial branches.[10]

CUMULATIVE SUPPLEMENT

Cases:

In determining whether separation of legislative and executive powers has been violated, the critical inquiry is whether the actions of one branch interfere with the functions of another. Mass. Const. pt. 1, art. 30; Mass. Const. pt. 2, ch. 1, § 1, art. 1. Desrosiers v. Governor, 486 Mass. 369, 158 N.E.3d 827 (2020).

[END OF SUPPLEMENT]

Footnotes

1 Harbuck v. State, 280 Ga. 775, 631 S.E.2d 351 (2006).

2 Golden v. Paterson, 23 Misc. 3d 641, 877 N.Y.S.2d 822 (Sup 2008).

3 Fent v. Contingency Review Bd., 2007 OK 27, 163 P.3d 512 (Okla. 2007) (passing an appropriation bill is a legislative lawmaking function while the administration of appropriated funds is a purely executive task).

4 Florida House of Representatives v. Crist, 999 So. 2d 601 (Fla. 2008).

5 Moreau v. Fuller, 276 Va. 127, 661 S.E.2d 841 (2008).
The executive branch is left only with the power to administer and enforce the state's tax laws, not to levy new taxes. Hawaii Insurers Council v. Lingle, 120 Haw. 51, 201 P.3d 564 (2008).
The President may not pass legislation, and Congress may not act in an executive capacity. In re Beck, 526 F. Supp. 2d 1291 (S.D. Fla. 2007).

6 Superior Court v. County of Mendocino, 13 Cal. 4th 45, 51 Cal. Rptr. 2d 837, 913 P.2d 1046 (1996).

7 Hunter v. State, 177 Vt. 339, 2004 VT 108, 865 A.2d 381 (2004).

8 U.S. Const. Art. I, § 6, cl. 1.

9 Eastland v. U. S. Servicemen's Fund, 421 U.S. 491, 95 S. Ct. 1813, 44 L. Ed. 2d 324 (1975); Gravel v. U. S., 408 U.S. 606, 92 S. Ct. 2614, 33 L. Ed. 2d 583 (1972).

10 Office of Governor v. Select Committee of Inquiry, 271 Conn. 540, 858 A.2d 709 (2004).

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VII. Departmental Separation of Governmental Powers

B. Executive Powers

3. Limitations with Regard to Legislative Department

§ 255. Actions of administrative agencies as limited by legislative authority; creation of rules or regulations

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 2620, 2621

The authority of an administrative agency is derived from the statute that created it[1] and with respect to the principle of separation of powers, an unlawful conflict or infringement occurs when an administrative agency goes beyond the existing statutes or case law it is charged with administering and claims the authority to modify this existing law or to create new law on its own.[2]

Administrative agencies cannot exercise legislative authority by creating law or changing the laws enacted by the legislature;[3] they do not have the authority to alter or amend a statute or enlarge or impair its scope.[4] A legislatively delegated power to an agency to make rules and regulations is administrative in nature, and it is not and cannot be the power to make laws; it is only the power to adopt regulations to carry into effect the will of the legislature as expressed by the statute.[5] Thus, an administrative agency cannot add or detract from a statute by promulgating a policy or regulation.[6] When determining whether an agency exceeded its delegation of power by crossing the line between administrative rule-making and legislative policy-making, a factor that courts consider is whether the agency used special expertise or competence in the field to develop the challenged regulations.[7]

Observation:

The doctrine of separation of powers is violated by administrative acts only when they are inconsistent with the legislature or usurp legislative prerogatives;[8] however, an administrative regulation, by creating liability, does not necessarily usurp the legislative function; many administrative rules carry the potential for administrative action and civil liability.[9]

Footnotes

1 Michigan Chiropractic Council v. Commissioner of Office of Financial and Ins. Services, 475 Mich. 363, 716 N.W.2d 561 (2006) (overruled on other grounds by, Lansing Schools Educ. Ass'n v. Lansing Bd. of Educ., 487 Mich. 349, 792 N.W.2d 686, 263 Ed. Law Rep. 360 (2010)).

2 In re Adjustments to Franchise Fees Required by Electrical Utility Industry Restructuring Act of 1999, 2000-NMSC-035, 129 N.M. 787, 14 P.3d 525 (2000).

3 In re Complaint of Rovas Against SBC Michigan, 482 Mich. 90, 754 N.W.2d 259 (2008).
An administrative order cannot amend a statute by adding terms and conditions that were not part of the original legislation. State v. Leukel, 979 So. 2d 292 (Fla. 5th DCA 2008).

4 Interinsurance Exchange of the Automobile Club v. Superior Court, 148 Cal. App. 4th 1218, 56 Cal. Rptr. 3d 421 (4th Dist. 2007).

5 Getty v. Carroll County Bd. of Elections, 399 Md. 710, 926 A.2d 216 (2007).

6 GTE v. Revenue Cabinet, Com. of Ky., 889 S.W.2d 788 (Ky. 1994).

7 Greater New York Taxi Ass'n v. New York City Taxi and Limousine Com'n, 25 N.Y.3d 600, 15 N.Y.S.3d 725, 36 N.E.3d 632 (2015).

8 McKinney v. Commissioner of New York State Dept. of Health, 15 Misc. 3d 743, 836 N.Y.S.2d 794 (Sup 2007), order aff'd, 41 A.D.3d 252, 840 N.Y.S.2d 6 (1st Dep't 2007).

9 Krupp Oil Co., Inc. v. Yeargan, 665 So. 2d 920 (Ala. 1995).

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West's Key Number Digest, Administrative Law and Procedure 1058
West's Key Number Digest, Constitutional Law 1026, 2355, 2450 to 2457, 2459, 2470, 2471, 2473 to 2476, 2478, 2480, 2483, 2486 to 2497, 2500, 2501, 2503(1), 2532, 2540, 2541, 2543 to 2545(2), 2545(4), 2549 to 2551, 2553, 2560, 2563, 2580, 2581, 2586, 2588, 2600, 2620
West's Key Number Digest, Mandamus 73(1)
West's Key Number Digest, Records 32

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West's A.L.R. Digest, Mandamus 73(1)

West's A.L.R. Digest, Records 32

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C. Judicial Powers

1. In General

§ 256. Judicial powers, generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 2450

As part of the endeavor to preserve the separation of powers, the judiciary must confine itself to the exercise of the judicial power and the judicial power alone.[1] Although a state's system of government allows each branch to exercise some control over the others in the form of checks and balances, the power to interfere is a limited one; a court will not interfere when doing so will threaten the independence or integrity or invade the prerogatives of another branch.[2]

The judiciary has a constitutional obligation to protect its own proper constitutional authority by upholding the independence of the judiciary.[3] The judiciary's inherent power governs that which is essential to the existence, dignity, and function of a court because it is a court.[4] Intrinsic within state sovereignty is an interest protecting the credibility of the state judiciary.[5] In a general way, the courts possess the entire body of judicial power, and the judiciary may not assign its powers to either of the other branches of government.[6] Thus, the other departments cannot, as a general rule, properly assume to exercise any part of the judicial power,[7] nor can the constitutional courts be hampered or limited in discharging their functions by either of the other two branches.[8]

Footnotes

1 Michigan Citizens for Water Conservation v. Nestle Waters North America Inc., 479 Mich. 280, 737 N.W.2d 447 (2007) (overruled on other grounds by, Lansing Schools Educ. Ass'n v. Lansing Bd. of Educ., 487 Mich. 349, 792 N.W.2d 686, 263 Ed. Law Rep. 360 (2010)).

The judicial power resides exclusively in the judicial branch and that court authority within that realm may not be violated. Norwood v. Horney, 110 Ohio St. 3d 353, 2006-Ohio-3799, 853 N.E.2d 1115 (2006).

2 Brown v. Owen, 165 Wash. 2d 706, 206 P.3d 310 (2009).

Two paramount concerns in considering separation of powers challenges to judicial action are: first, that the judicial branch neither be assigned nor allowed tasks that are more properly accomplished by other branches; and, second, that no provision of law impermissibly threatens the institutional integrity of the judicial branch. Long v. Wal-Mart Stores, Inc., 98 Ark. App. 70, 250 S.W.3d 263 (2007).

3 Foster v. Sakhai, 210 W. Va. 716, 559 S.E.2d 53 (2001).

The authority to maintain a judicial department is an incident to the sovereignty of each state, and it is an imperative duty of the judicial department of government to protect its jurisdiction at the boundaries of power fixed by the state constitution. State ex rel. Shepherd v. Nebraska Equal Opportunity Com'n, 251 Neb. 517, 557 N.W.2d 684 (1997).

4 State v. M.D.T., 831 N.W.2d 276 (Minn. 2013).

5 Montoya v. Ulibarri, 2007-NMSC-035, 142 N.M. 89, 163 P.3d 476 (2007).

6 O'Day v. Yeager, 284 A.D. 754, 134 N.Y.S.2d 806 (4th Dep't 1954), order rev'd on other grounds, 308 N.Y. 580, 127 N.E.2d 585 (1955).

Delegation of judicial power, generally, see § 310.

7 Laisne v. State Bd. of Optometry, 19 Cal. 2d 831, 123 P.2d 457 (1942); Attorney General ex rel. Cook v. O'Neill, 280 Mich. 649, 274 N.W. 445 (1937).

8 In re Advisory Opinion to the Governor, 213 So. 2d 716 (Fla. 1968).

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§ 257. Judicial functions, generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 2450

The judicial power is conferred upon the courts by the constitution and cannot be exercised by any other body in the absence of a constitutional provision.[1] These powers include rulemaking, supervisory, and other administrative powers, as well as traditional adjudicative ones; they have been exclusively entrusted to the judiciary by the constitution and may not be diminished, exercised by, nor interfered with by the other branches of government without constitutional authorization.[2] Resolving specific controversies between parties, declaring the law, and ensuring the orderly and effective administration of justice are core judicial functions protected by the separation of powers doctrine.[3]

The fundamental function of the judicial branch of government is judicial review;[4] which belongs exclusively to the judicial branch.[5] It is a separation-of-powers principle that when an Act of Congress is alleged to conflict with the Constitution, it is emphatically the province and duty of the judicial department to say what the law is.[6]

Footnotes

1 McClung v. Employment Development Dept., 34 Cal. 4th 467, 20 Cal. Rptr. 3d 428, 99 P.3d 1015 (2004). As the judicial branch derives its power from the constitution, courts are bound to accept the limitations placed upon the judiciary by that document. Newman Marchive Partnership, Inc. v. City of Shreveport, 979 So. 2d 1262 (La. 2008).

2 Maldonado v. Ford Motor Co., 476 Mich. 372, 719 N.W.2d 809 (2006).

3 Case v. Lazben Financial Co., 99 Cal. App. 4th 172, 121 Cal. Rptr. 2d 405 (2d Dist. 2002).

The power of the judiciary is the authority to declare finally the rights of the parties, in a particular case or controversy, based on the law at the time the judgment becomes final. City of Daphne v. City of Spanish Fort, 853 So. 2d 933 (Ala. 2003).

4 Hale v. Wellpinit School Dist. No. 49, 165 Wash. 2d 494, 198 P.3d 1021 (2009).

5 Grievance Adm'r v. Fieger, 476 Mich. 231, 719 N.W.2d 123 (2006).

The power to review decisions of separate departments of government—judicial review—is an exclusive power of the judiciary. Chastain v. Chastain, 932 S.W.2d 396 (Mo. 1996).

6 U.S. v. Windsor, 570 U.S. 744, 133 S. Ct. 2675, 186 L. Ed. 2d 808 (2013).

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1. In General

§ 258. Protection of constitutional rights as judicial function

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 2450, 2452 to 2455, 2457, 2459
West's Key Number Digest, Records 32

The protection of constitutional rights is a core function of the judiciary.[1] More specifically, the judiciary has a duty to safeguard the rights afforded under a state constitution.[2] The duty to confront racial animus in the justice system is not the legislature's alone; the United States Supreme Court has been called upon to enforce the Constitution's guarantee against state-sponsored racial discrimination in the jury system.[3]

Footnotes

1 State v. Solomon, 157 N.H. 47, 943 A.2d 819 (2008).

2 People v. LaValle, 3 N.Y.3d 88, 783 N.Y.S.2d 485, 817 N.E.2d 341 (2004).

3 Pena-Rodriguez v. Colorado, 137 S. Ct. 855, 197 L. Ed. 2d 107, 102 Fed. R. Evid. Serv. 1084 (2017).

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§ 259. Interpreting and determining constitutionality of statutes as judicial function

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 2450, 2452 to 2455, 2457, 2459
West's Key Number Digest, Records 32

A major responsibility of the judicial branch of government is deciding what statutes mean.[1] Statutory interpretation is the responsibility of the court and within the exclusive province of the judiciary.[2] Thus, in matters of statutory interpretation, it is the province and duty of the judicial department to say what the law is.[3] Further, courts have the power to determine whether a statute is constitutional.[4] Although the constitutionally defined judicial power of the United States is not an unconditioned authority to determine the constitutionality of legislative or executive acts,[5]

Footnotes

1 County of Dane v. Labor and Industry Review Com'n, 2009 WI 9, 315 Wis. 2d 293, 759 N.W.2d 571 (2009).

2 Wright v. State, 881 N.E.2d 1018 (Ind. Ct. App. 2008); Tensas Poppadoc, Inc. v. Chevron USA, Inc., 10 So. 3d 1259 (La. Ct. App. 3d Cir. 2009), writ denied, 17 So. 3d 976 (La. 2009).

3 Washington v. District of Columbia Dept. of Public Works, 954 A.2d 945 (D.C. 2008).

4 State ex rel. Morrison v. Sebelius, 285 Kan. 875, 179 P.3d 366 (2008); Piazza's Seafood World, LLC v. Odom, 6 So. 3d 820 (La. Ct. App. 1st Cir. 2008); Baines v. New Hampshire Senate President, 152 N.H. 124, 876 A.2d 768 (2005).

The power of judicial review includes the authority to declare acts of the state legislature to be unconstitutional. City of Belmont v. Mississippi State Tax Com'n, 860 So. 2d 289 (Miss. 2003).

5 Hein v. Freedom From Religion Foundation, Inc., 551 U.S. 587, 127 S. Ct. 2553, 168 L. Ed. 2d 424, 44 A.L.R. Fed. 2d 637 (2007).

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1. In General

§ 260. Sentencing of convicted criminals as judicial function

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 2450, 2452 to 2455, 2457, 2459
West's Key Number Digest, Records 32

For purposes of constitutional separation of powers, sentencing is a judicial function.[1] Accordingly, although the authority to fix the limits of punishment for criminal acts lies with the legislature, the imposition of a sentence in a particular case within those limits is a judicial function.[2] A judicially imposed sentence is final and may not be modified by another branch of government.[3]

Footnotes

1 People v. Oglethorpe, 87 P.3d 129 (Colo. App. 2003), as modified on denial of reh'g, (Aug. 14, 2003); Doe v. State, 688 N.W.2d 265 (Iowa 2004).

2 State v. Bluhm, 676 N.W.2d 649 (Minn. 2004).
Sentencing remains a court function, and judicial fact-finding is permitted as long as it is understood that the federal sentencing guidelines are not mandatory. U.S. v. Mooney, 401 F.3d 940 (8th Cir. 2005), on reh'g en banc in part, 425 F.3d 1093 (8th Cir. 2005).
Nonmandatory nature of the federal sentencing guidelines, see Am. Jur. 2d, Criminal Law § 750.

3 Com. v. Cole, 468 Mass. 294, 10 N.E.3d 1081 (2014).

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1. In General

§ 261. Regulation of practice of law as judicial function

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 2450, 2452 to 2455, 2457, 2459
West's Key Number Digest, Records 32

The regulation of the practice of law is a core judicial function for purposes of the constitutional separation of powers.[1] and the judicial branch of government has the exclusive power to determine what constitutes the practice of law.[2] Included in the judicial department's power to regulate the practice of law is the state supreme court's inherent authority to prescribe conditions for admission to the state bar, to define, supervise, regulate and control the practice of law, whether in or out of court, and this is so notwithstanding acts of the legislature in the exercise of its police power to protect the public interest and welfare.[3] A court's authority to discipline attorneys and regulate their conduct in proceedings before that court is a constitutional power derived from the separation of powers between the judiciary, as an independent branch of government, and the other branches.[4]

Footnotes

1 In re Petition of New Hampshire Bar Ass'n, 151 N.H. 112, 855 A.2d 450 (2004).
The Labor Commission's schedule for attorney's fees in workers' compensation cases, and its authorizing statute, were unconstitutional, since the Utah Supreme Court was vested with exclusive inherent and constitutional authority to govern the practice of law, and the court could not under the separation-of-powers doctrine delegate the regulation of attorney's fees to the legislature or the Commission. Injured Workers Ass'n of Utah v. State, 2016 UT 21, 374 P.3d 14 (Utah 2016).

2 Real Estate Bar Ass'n For Mass., Inc. v. National Real Estate Information Services, 609 F. Supp. 2d 135 (D. Mass. 2009), rev'd in part on other grounds, vacated in part on other grounds, 608 F.3d 110 (1st Cir. 2010), certified question answered, 459 Mass. 512, 946 N.E.2d 665 (2011).

3 Hays v. Ruther, 298 Kan. 402, 313 P.3d 782 (2013).

4 In re Moseley, 273 Va. 688, 643 S.E.2d 190 (2007).

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§ 262. Responsibility for court records and personnel as judicial function

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 2450, 2452 to 2455, 2457, 2459
West's Key Number Digest, Records 32

The judiciary has exclusive power and responsibility over court records[1] and court personnel.[2] It is the responsibility of the trial court to determine, in the exercise of its informed discretion, whether the common-law right of access to public judicial documents will outweigh countervailing factors.[3]

Footnotes

1 State v. D.H.W., 686 So. 2d 1331 (Fla. 1996).

2 Opinion of the Justices, 140 N.H. 297, 666 A.2d 523 (1995) (for purposes of a separation of powers analysis, the authority to regulate officers of the court is inherent in the judicial branch).

3 Com. v. Martinez, 2007 PA Super 33, 917 A.2d 856 (2007).

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§ 263. Judicial functions as regards foreign policy, U.S obligations under international law, and national security

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 2450, 2452 to 2455, 2457, 2459
West's Key Number Digest, Records 32

A court may examine the merits of a case that touches on foreign policy in some instances, such as when a statutory scheme exists to guide the court's determination of an issue; in contrast, where there is an utter absence of statutory, administrative or case law available to guide a court's decision, it disfavors resolution on the merits.[1] Defining and enforcing the United States' obligations under international law require the making of extremely sensitive policy decisions that will inevitably color relationships with other nations, and as such they are decisions of a kind for which the Judiciary has neither aptitude, facilities, nor responsibility.[2] Judicial inquiry into the national-security realm raises concerns for the separation of powers in trenching on matters committed to the other branches; these concerns are even more pronounced when the judicial inquiry comes in the context of a claim seeking money damages rather than a claim seeking injunctive or other equitable relief.[3]

Footnotes

1 Spectrum Stores, Inc. v. Citgo Petroleum Corp., 632 F.3d 938 (5th Cir. 2011).

2 U.S. v. Belfast, 611 F.3d 783 (11th Cir. 2010).

3 Ziglar v. Abbasi, 137 S. Ct. 1843, 198 L. Ed. 2d 290 (2017).

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1. In General

§ 264. Interpretation of Constitution as judicial function; maintaining separation of powers

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 2451, 2452

The construction of a constitution is a judicial function.[1] Although each branch of government must apply and uphold the constitution, the courts bear the ultimate responsibility for interpreting its provisions.[2] A court is to interpret constitutional questions as long as there do not exist uncertainties surrounding the subject matter that have been clearly committed to another branch of government to resolve.[3]

Article III of the Constitution establishes an independent Judiciary, a Third Branch of Government with the province and duty to say what the law is in particular cases and controversies.[4] The judiciary is the ultimate interpreter of the Federal Constitution and, in most instances, claims alleging its violation will rightly be heard by the courts.[5] More specifically, it is the ultimate prerogative of the judiciary to determine whether an act of Congress is consistent with the United States Constitution.[6]

The judicial powers include the important function of preventing departmental encroachment, such as marking out the boundaries of each department and remedying the invasions by either of the territory of the other.[7] Thus, it is also the role of the judiciary to determine when the executive and legislative branches of government have overstepped their authority.[8] The quintessential power of the judiciary is the power to make final determinations of questions of law; this power nondelegable and rests exclusively with the judiciary.[9]

Footnotes

1 City of Omaha v. City of Elkhorn, 276 Neb. 70, 752 N.W.2d 137 (2008).
Construing the meaning of constitutional language is a basic judicial function. WPW Acquisition Co. v. City of Troy, 466 Mich. 117, 643 N.W.2d 564 (2002).

2 Forty-Seventh Legislature of State v. Napolitano, 213 Ariz. 482, 143 P.3d 1023 (2006); Washington County Bd. of Equalization v. Petron Development Co., 109 P.3d 146 (Colo. 2005); Schilling v. State Crime Victims Rights Bd., 2005 WI 17, 278 Wis. 2d 216, 692 N.W.2d 623 (2005).
The ultimate interpretation and determination of the Fourteenth Amendment's substantive meaning is the province of the judicial branch. Kimel v. Florida Bd. of Regents, 528 U.S. 62, 120 S. Ct. 631, 145 L. Ed. 2d 522, 140 Ed. Law Rep. 825, 187 A.L.R. Fed. 543 (2000).

3 Nelson v. Hawaiian Homes Com'n, 127 Haw. 185, 277 P.3d 279 (2012).

4 Bank Markazi v. Peterson, 136 S. Ct. 1310, 194 L. Ed. 2d 463 (2016).

5 Ralls Corp. v. Committee on Foreign Inv. in U.S., 758 F.3d 296 (D.C. Cir. 2014).

6 Action for Children's Television v. F.C.C., 58 F.3d 654 (D.C. Cir. 1995).

7 Baker v. Carr, 369 U.S. 186, 82 S. Ct. 691, 7 L. Ed. 2d 663 (1962); Pepper v. Pepper, 66 So. 2d 280 (Fla. 1953).

8 Limbert v. Mississippi University for Women Alumnae Ass'n, Inc., 998 So. 2d 993, 241 Ed. Law Rep. 497 (Miss. 2008).
The authority and duty of the judiciary to determine the constitutionality and, therefore, the validity of the acts of the other branches of government have firmly been established as an essential feature of the system of separation of powers. In re Goodman, 161 Ohio App. 3d 192, 2005-Ohio-2364, 829 N.E.2d 1219 (11th Dist. Ashtabula County 2005).

9 Alakai Na Keiki, Inc. v. Matayoshi, 127 Haw. 263, 277 P.3d 988, 280 Ed. Law Rep. 450 (2012).

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VII. Departmental Separation of Governmental Powers

C. Judicial Powers

1. In General

§ 265. Inherent judicial powers

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 2450

Separation-of-powers provisions establish the basis for inherent judicial powers that are not specifically enumerated in the constitution.[1] The judiciary's inherent authority grows out of express and implied constitutional provisions mandating a separation of powers and a viable judicial branch of government.[2] The doctrine of inherent judicial authority is the source of power to perform a judicial function for which the legislative branch failed to provide fully.[3] Inherent powers of the judicial branch are those that are essential to the existence of the court and the orderly and efficient exercise of the administration of justice.[4] One test for "inherent power," as laid out in a separation of powers clause, is whether the subject matter is so ultimately connected and bound up with a branch's function that the right to define and regulate the subject matter naturally and logically belongs to the branch of government.[5]

The inherent powers of the judiciary should be used sparingly and only to the extent necessary to ensure judicial independence and integrity.[6] Inherent powers are necessary for courts to properly function as a separate branch of government but cannot be used to offend the doctrine of separation of powers by usurping authority delegated to another branch of government.[7] When a question arises regarding the scope of the judiciary's inherent authority, courts must resolve all reasonable doubts in favor of a coordinate branch.[8]

Footnotes

1 Wooley v. State Farm Fire and Cas. Ins. Co., 893 So. 2d 746 (La. 2005).
Inherent powers of courts, generally, see Am. Jur. 2d, Courts §§ 36 to 38.

2 State v. S.L.H., 755 N.W.2d 271 (Minn. 2008).

3 State v. Plumb, 192 Or. App. 623, 87 P.3d 676 (2004).

4 Ivarsson v. Office of Indigent Defense Services, 156 N.C. App. 628, 577 S.E.2d 650 (2003).

5 Vandelay Entertainment, LLC v. Fallin, 2014 OK 109, 343 P.3d 1273 (Okla. 2014).

6 Hoag v. State, 889 So. 2d 1019 (La. 2004).

7 State v. Hoegh, 632 N.W.2d 885 (Iowa 2001).

8 State v. M.D.T., 831 N.W.2d 276 (Minn. 2013).

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VII. Departmental Separation of Governmental Powers

C. Judicial Powers

1. In General

§ 266. Distinctions between judiciary and executive and legislative departments

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 2450, 2473

The legislative branch of government enacts the law, the judiciary interprets those laws, and the executive branch enforces those laws until they are amended or held to be unconstitutional.[1] The constitution reserves separate governmental functions for the courts and for the legislature.[2] Under the separation of powers doctrine, statutory construction belongs to the courts, legislation to the legislature;[3] it is emphatically the province and duty of the judicial department to say what the law is but in such a determination, the judiciary is to ascertain and give effect to the intention of the legislature.[4]

As a matter of constitutional law, the judicial branch governs procedural matters while the creation of substantive law is a legislative function.[5] In a democracy, the power to make the law rests with those chosen by the people, and the United States Supreme Court's role is more confined: namely, to say what the law is.[6]

Footnotes

1 Harbuck v. State, 280 Ga. 775, 631 S.E.2d 351 (2006).

2 In re Detention of Savala, 147 Wash. App. 798, 199 P.3d 413 (Div. 3 2008).

3 Staley v. State, 284 Ga. 873, 672 S.E.2d 615 (2009).

4 Chauncey F. Hutter, Inc. v. Virginia Employment Com'n, 50 Va. App. 590, 652 S.E.2d 151 (2007).

The judicial function is to interpret, declare, and enforce the law, not to make it, and it is not for the courts to correct supposed errors, omissions, or defects in legislation. Janssen v. Incorporated Village of Rockville Centre, 59 A.D.3d 15, 869 N.Y.S.2d 572 (2d Dep't 2008).

5 State v. Lemmer, 736 N.W.2d 650 (Minn. 2007).

6 King v. Burwell, 135 S. Ct. 2480, 192 L. Ed. 2d 483 (2015).

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VII. Departmental Separation of Governmental Powers

C. Judicial Powers

1. In General

§ 267. Distinction between judiciary and administrative agencies and tribunals

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 1058
West's Key Number Digest, Constitutional Law 2450, 2563, 2620
West's Key Number Digest, Statutes 219(1)

What essentially distinguishes a court from an administrative agency is that under our constitutional system of separation of the three branches of government, courts are part of the judicial branch whereas administrative agencies and tribunals are part of the executive branch of the government.[1] Administrative agencies are not inferior tribunals in relation to the trial courts; rather, they are independent units of the executive branch of state government.[2] When an administrative agency addresses a question of law by construing or applying a particular statute, courts will grant some deference to legal determinations that fall within the agency's expertise; however, it is a function of the courts to interpret the law, and courts are in no way bound by an agency's legal interpretation.[3]

In the federal court system, administrative adjudications are not Article III proceedings to which either the "case or controversy" or prudential standing requirements apply.[4]

Congress and various state legislatures frequently delegate policymaking authority to administrative agencies, and that authority cannot be delegated to or imposed on federal or state courts.[5] When Congress or a state legislature has done this, through express delegation or introduction of an interpretive gap in the statutory structure, the extent of judicial review of the administrative agency's policy determinations may be limited.[6]

Footnotes

1 Quinton v. General Motors Corp., 453 Mich. 63, 551 N.W.2d 677 (1996).

2 State v. Maryland State Bd. of Contract Appeals, 364 Md. 446, 773 A.2d 504 (2001).

3 Chavez v. Mountain States Constructors, 1996-NMSC-070, 122 N.M. 579, 929 P.2d 971 (1996).
Although decisions by administrative agencies are given deference when they fall within an area of an agency's specialized competence, issues of statutory interpretation fall outside those areas and are not entitled to deference on judicial review. Virginia Dept. of Health v. NRV Real Estate, LLC, 278 Va. 181, 677 S.E.2d 276 (2009).

4 Ecee, Inc. v. Federal Energy Regulatory Commission, 645 F.2d 339 (5th Cir. 1981); Yates v. Charles County Bd. of Educ., 212 F. Supp. 2d 470, 168 Ed. Law Rep. 238 (D. Md. 2002).
Because agencies are not constrained by Article III, nor are they governed by judicially created, standing doctrines restricting access to federal courts, the criteria for establishing administrative standing may permissibly be less demanding than the criteria for judicial standing. Envirocare of Utah, Inc. v. Nuclear Regulatory Com'n, 194 F.3d 72 (D.C. Cir. 1999).

5 Pauley v. BethEnergy Mines, Inc., 501 U.S. 680, 111 S. Ct. 2524, 115 L. Ed. 2d 604 (1991).

6 Pauley v. BethEnergy Mines, Inc., 501 U.S. 680, 111 S. Ct. 2524, 115 L. Ed. 2d 604 (1991); Teper v. Miller, 82 F.3d 989 (11th Cir. 1996).
A trial court may not interfere with and does not have the authority to enter into the decision-making process that is delegated to a state agency. Department of Revenue ex rel. Jackson v. Nesbitt, 975 So. 2d 549 (Fla. 4th DCA 2008).

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VII. Departmental Separation of Governmental Powers

C. Judicial Powers

2. Limitations

a. In General

§ 268. Limitations on judicial powers, generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 2450, 2600

Under all circumstances, it is the imperative duty of the courts to support the state constitution.[1] As part of the tripartite constitutional structure, the judiciary must act prudentially to abstain from encroaching on the power of a coequal branch.[2] Thus, in order to remain faithful to the Federal Constitution's tripartite structure, the authority of the federal judiciary may not be permitted to intrude upon the powers given to the other branches.[3] Under the basic concept of separation of powers that flows from the scheme of a tripartite government adopted in the Constitution, the judicial power of the United States can no more be shared with another branch than the Chief Executive can share with the Judiciary the veto power, or the Congress share with the Judiciary the power to override a Presidential veto.[4] If the text of a constitution has demonstrably committed the disposition of a particular matter to a coordinate branch of government, a court should decline to adjudicate the issue to avoid encroaching upon the authority and functions of that branch[5] and should refrain from nullifying the acts of another branch except when those acts are plainly and clearly in conflict with constitutional provisions.[6] Courts at all levels cannot substitute their judgment for that of the coordinate branch of government to whom that judgment has been primarily entrusted under the scheme of dividend government.[7]

The law of Article III standing, which is built on separation-of-powers principles, serves to prevent the judicial process from being used to usurp the powers of the political branches,[8] and limits the courts to a properly judicial role.[9] In particular, the

federal courts and most state courts have no authority to issue advisory opinions,[10] which are an executive, not a judicial, function.[11]

Footnotes

1 Otto v. Harllee, 119 Fla. 266, 161 So. 402 (1935).
In West Virginia, the Supreme Court of Appeals has the duty to take actions that are necessary to protect and guard the Constitutions of the United States and of West Virginia. Crain v. Bordenkircher, 192 W. Va. 416, 452 S.E.2d 732 (1994).

2 State ex rel. Sviggum v. Hanson, 732 N.W.2d 312 (Minn. Ct. App. 2007).

3 Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 194 L. Ed. 2d 635 (2016), as revised, (May 24, 2016).

4 Stern v. Marshall, 564 U.S. 462, 131 S. Ct. 2594, 180 L. Ed. 2d 475 (2011).

5 Horton v. McLaughlin, 149 N.H. 141, 821 A.2d 947 (2003).

6 Jackson Lumber Co. v. Walton County, 95 Fla. 632, 116 So. 771 (1928).

7 Maryland Reception, Diagnostic & Classification Center v. Watson, 144 Md. App. 684, 800 A.2d 16 (2002).
Under the separation of powers requirement of the constitution, when interpreting a statute, it is not the judiciary's prerogative to question the merit of a policy preference or to substitute its preference for the legislature's judgment. Fast Tract Framing, Inc. v. Caraballo, 994 So. 2d 355 (Fla. 1st DCA 2008).
It is not the duty of the state supreme court to criticize the legislature or to substitute its view on economic or social policy; it is the duty of the supreme court to safeguard the constitution. State ex rel. Six v. Kansas Lottery, 286 Kan. 557, 186 P.3d 183 (2008).

8 Town of Chester, N.Y. v. Laroe Estates, Inc., 137 S. Ct. 1645, 198 L. Ed. 2d 64, 97 Fed. R. Serv. 3d 1671 (2017); Susan B. Anthony List v. Driehaus, 573 U.S. 149, 134 S. Ct. 2334, 189 L. Ed. 2d 246 (2014).

9 Town of Chester, N.Y. v. Laroe Estates, Inc., 137 S. Ct. 1645, 198 L. Ed. 2d 64, 97 Fed. R. Serv. 3d 1671 (2017); Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 194 L. Ed. 2d 635 (2016), as revised, (May 24, 2016).

10 § 132.
The jurisdiction of federal courts is limited by the Federal Constitution to "cases and controversies" and that language prohibits advisory opinions. Mosley v. State, 908 N.E.2d 599 (Ind. 2009).

11 Shipe v. Public Wholesale Water Supply Dist. No. 25, 289 Kan. 160, 210 P.3d 105 (2009).

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VII. Departmental Separation of Governmental Powers

C. Judicial Powers

2. Limitations

a. In General

§ 269. Determination of political or other nonjusticiable questions as outside scope of judicial function

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 2456, 2580

A.L.R. Library

Application of Political Question Doctrine by U.S. Supreme Court, 75 A.L.R. Fed. 2d 1

Forms

Forms relating to failure to state justiciable controversy, see Am. Jur. Pleading and Practice Forms, Federal Practice and Procedure [Westlaw® Search Query]

Law Reviews and Other Periodicals

Crook, U.S. Supreme Court Rules Statute Directing State Department to Record Jerusalem-Born Citizen's Birthplace as "Israel" Does not Raise Political Question, 106 Am. J. Int'l L. 644 (July 2012)

Under the "justiciability doctrine," the judicial branch is constrained from exercising powers reserved to coordinate branches of government.[1] If relief cannot be granted except by undermining the constitutionally based separation of powers, prudential considerations necessitate avoiding adjudication on the grounds that those cases are nonjusticiable.[2] Justiciability questions are generally divisible into several subcategories: advisory opinions, feigned and collusive cases, standing, ripeness, mootness, administrative questions, and political questions.[3] The political question doctrine excludes from judicial review those controversies that revolve around policy choices and value determinations constitutionally committed for resolution to the legislative and executive branches.[4] Cases and controversies that contain a textually demonstrable constitutional commitment of the issue to a coordinate political department, or revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch, present a "narrow exception" to a court's Article III responsibility to decide cases properly before it.[5] The doctrine reflects the principle that, under the Constitution, there are some questions that cannot be answered by the judicial branch; rather, out of due respect for the coordinate branches and in recognition of the fact that a court is incompetent to make a final resolution of certain matters, these political questions are deemed nonjusticiable.[6] Although it is the province and duty of the judicial department to say what the law is, sometimes the law is that the judicial department has no business entertaining the claim of unlawfulness, because the question is entrusted to one of the political branches or involves no judicially enforceable rights; in such case, the claim is said to present a "political question" and to be nonjusticiable, that is, outside the courts' competence and therefore beyond the courts' jurisdiction.[7]

A controversy involves a "political question," such that a court lacks the authority to decide the dispute before it, when there is a textually demonstrable constitutional commitment of the issue to a coordinate political department,[8] or a lack of judicially discoverable and manageable standards for resolving it.[9] Other factors that may make an issue nonjusticiable under the political question doctrine are (1) the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; (2) the impossibility of the court's undertaking an independent resolution without expressing a lack of respect due the coordinate branches of government; (3) an unusual need for unquestioning adherence to a political decision already made; or (4) the potentiality of embarrassment from multifarious pronouncements by various departments on one question.[10] The political question doctrine must be cautiously invoked, and the mere fact that a case touches on the political process does not necessarily create a political question beyond a court's jurisdiction.[11] It would be inappropriate to dismiss a case on the mere chance that a political question may eventually present itself.[12] There should be no dismissal for nonjusticiability on the ground of a political question's presence, unless a political question is inextricable from the case at bar.[13]

Footnotes

1 Iberville Parish Waterworks Dist. No. 3 v. Novartis Crop Protection, Inc., 45 F. Supp. 2d 934 (S.D. Ala. 1999), aff'd, 204 F.3d 1122 (11th Cir. 1999).

2 Greenberg v. Bush, 150 F. Supp. 2d 447 (E.D. N.Y. 2001).

3 Cowan v. Board of Com'rs of Fremont County, 143 Idaho 501, 148 P.3d 1247 (2006).

4 Rippon v. Bowen, 160 Cal. App. 4th 1308, 73 Cal. Rptr. 3d 421 (2d Dist. 2008), as modified, (Mar. 19, 2008); Nebraska Coalition for Educational Equity and Adequacy (Coalition) v. Heineman, 273 Neb. 531, 731 N.W.2d 164, 219 Ed. Law Rep. 761 (2007). The political question doctrine applies to municipal ordinances. Blackwell v. City of Philadelphia, 546 Pa. 358, 684 A.2d 1068 (1996).

5 Sierra Club v. Trump, 929 F.3d 670 (9th Cir. 2019).

6 Lane v. Halliburton, 529 F.3d 548 (5th Cir. 2008).

The determination of who is sovereign over specific territory is a nonjusticiable political question. Lin v. U.S., 539 F. Supp. 2d 173 (D.D.C. 2008), aff'd, 561 F.3d 502 (D.C. Cir. 2009).

7 Rucho v. Common Cause, 139 S. Ct. 2484, 204 L. Ed. 2d 931 (2019).

8 Zivotofsky ex rel. Zivotofsky v. Clinton, 566 U.S. 189, 132 S. Ct. 1421, 182 L. Ed. 2d 423, 75 A.L.R. Fed. 2d 637 (2012); Khouzam v. Attorney General of U.S., 549 F.3d 235 (3d Cir. 2008); Barker v. Conroy, 921 F.3d 1118 (D.C. Cir. 2019).

In the context of subject-matter jurisdiction, not all claims arising from security clearance revocations violate separation of powers or involve political questions. Dubuque v. Boeing Company, 917 F.3d 666 (8th Cir. 2019).

9 Rucho v. Common Cause, 139 S. Ct. 2484, 204 L. Ed. 2d 931 (2019); Zivotofsky ex rel. Zivotofsky v. Clinton, 566 U.S. 189, 132 S. Ct. 1421, 182 L. Ed. 2d 423, 75 A.L.R. Fed. 2d 637 (2012); Khouzam v. Attorney General of U.S., 549 F.3d 235 (3d Cir. 2008).

10 Khouzam v. Attorney General of U.S., 549 F.3d 235 (3d Cir. 2008); E.E.O.C. v. Peabody Western Coal Co., 400 F.3d 774, 60 Fed. R. Serv. 3d 1246 (9th Cir. 2005) (rejected on other grounds by, Gonzalez-Aviles v. Perez, 2016 WL 3440581 (D. Md. 2016)).

11 In re Nazi Era Cases Against German Defendants Litigation, 129 F. Supp. 2d 370 (D.N.J. 2001).

12 McMahon v. Presidential Airways, Inc., 502 F.3d 1331, 24 A.L.R. Fed. 2d 729 (11th Cir. 2007).

13 Tarros S.p.A. v. U.S., 982 F. Supp. 2d 325 (S.D. N.Y. 2013).

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C. Judicial Powers

2. Limitations

a. In General

§ 270. Determination of political or other nonjusticiable questions as outside scope of judicial function—Particular issues as presenting political or nonjusticiable questions

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 2580, 2581, 2586, 2588

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Constitutional Validity of Congressional Redistricting—Supreme Court Cases, 82 A.L.R. Fed. 2d 1
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Altman and McDonald, A Half-Century of Virginia Redistricting Battles: Shifting from Rural Malapportionment to Voting Rights to Public Participation, 47 U. Rich. L. Rev. 771 (2013)

Cain, Redistricting Commissions: A Better Political Buffer?, 121 Yale L.J. 1808 (2012)

Manheim, Redistricting Litigation and the Delegation of Democratic Design, 93 B.U. L. Rev. 563 (2013)

Spencer, The Right Choice for Elections: How Choice Voting Will End Gerrymandering and Expand Minority Voting Rights, from City Councils to Congress, 47 U. Rich. L. Rev. 959 (2013)

Constitutional challenges to apportionment are justiciable.[1] Legislative reapportionment is a justiciable issue upon which an aggrieved citizen whose right to vote has been impaired may resort to the courts for relief.[2] However, election redistricting is principally a legislative function, and legislative action is entitled to great deference in election redistricting matters; the courts should only intervene when the legislature has failed to perform its function in a constitutional manner.[3] The issue of whether Congress's apportionment of congressional districts among the states was constitutional does not involve a nonjusticiable political question.[4] It is not the court's function to decide the peculiarly political questions involved in reapportionment, but it is the court's duty to insure the electorate equal protection of the laws.[5]

Similarly, recognition of a cause of action to challenge racial gerrymandering in drawing congressional districts does not threaten excessive judicial entanglement into a state's districting process despite the complexity of the districting process that prevents adoption of bright-line rules.[6]

Among other matters that have been held to be political questions or otherwise nonjusticiable are:

• Judicial review of the constitutionality of the United States Senate's "Cloture Rule" or "Filibuster Rule"[7]

• The internal procedures of a legislature in amending a state constitution[8]

• Whether a state's right to a republican form of government had been violated[9]

• The enforcement of immigration laws[10]

• Controversies pertaining to foreign commerce controversies[11]

Footnotes

1 Franklin v. Massachusetts, 505 U.S. 788, 112 S. Ct. 2767, 120 L. Ed. 2d 636 (1992).

2 Armentrout v. Schooler, 409 S.W.2d 138 (Mo. 1966).

3 LeRoux v. Secretary of State, 465 Mich. 594, 640 N.W.2d 849 (2002).
The political question doctrine did not bar the court's consideration of District of Columbia residents' constitutional challenge to the denial of their right to elect representatives to Congress; the purely legal issue

was one the courts were perfectly capable of resolving. Adams v. Clinton, 90 F. Supp. 2d 35 (D.D.C. 2000), judgment aff'd, 531 U.S. 940, 121 S. Ct. 336, 148 L. Ed. 2d 269 (2000) and judgment aff'd, 531 U.S. 941, 121 S. Ct. 336, 148 L. Ed. 2d 270 (2000).

4 U.S. Dept. of Commerce v. Montana, 503 U.S. 442, 112 S. Ct. 1415, 118 L. Ed. 2d 87 (1992).

5 In re Below, 151 N.H. 135, 855 A.2d 459 (2004).

6 Bush v. Vera, 517 U.S. 952, 116 S. Ct. 1941, 135 L. Ed. 2d 248 (1996) (holding that in such cases, courts will remain in their customary and appropriate backstop role).

7 Common Cause v. Biden, 909 F. Supp. 2d 9 (D.D.C. 2012), aff'd on other grounds, 748 F.3d 1280 (D.C. Cir. 2014) (reaching merits of the case would require invasion into the internal processes at the heart of the Senate's constitutional prerogatives as a House of Congress).

8 Grimaud v. Com., 581 Pa. 398, 865 A.2d 835 (2005).

9 Murtishaw v. Woodford, 255 F.3d 926 (9th Cir. 2001) (a challenge to a state constitutional amendment based on the Guarantee Clause of the Federal Constitution).

Claims brought under the Federal Constitution's Guarantee Clause which guarantees a republican form of government do not present justiciable controversies that can be adjudicated by the courts; rather, the Guarantee Clause provides a political guarantee that must be addressed through the political process. Clayton v. Kiffmeyer, 688 N.W.2d 117 (Minn. 2004).

10 Sadowski v. Bush, 293 F. Supp. 2d 15 (D.D.C. 2003), dismissed, 2004 WL 547605 (D.C. Cir. 2004).

11 Barclays Bank PLC v. Franchise Tax Bd. of California, 512 U.S. 298, 114 S. Ct. 2268, 129 L. Ed. 2d 244 (1994); Made in the USA Foundation v. U.S., 242 F.3d 1300, 183 A.L.R. Fed. 679 (11th Cir. 2001).

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2. Limitations

a. In General

§ 271. Foreign policy and national defense as presenting political or other nonjusticiable questions outside scope of judicial function

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Crook, U.S. Supreme Court Rules Statute Directing State Department to Record Jerusalem-Born Citizen's Birthplace as "Israel" Does not Raise Political Question, 106 Am. J. Int'l L. 644 (July 2012)

Vladeck, The Separation of National Security Powers: Lessons from the Second Congress, 129 Yale L.J. Forum 610 (2020)

The political-question doctrine excludes from judicial review those controversies that revolve around decision making in the fields of foreign policy and national security.[1] The power to conduct foreign affairs is constitutionally committed to the political branches.[2] Although matters implicating foreign relations and military affairs are generally beyond the authority or competency of a court's adjudicative powers, not all questions touching foreign relations are nonjusticiable under the political question doctrine,[3] and a predicted negative impact on foreign relations does not, by itself, render a case nonjusticiable under the political question doctrine.[4]

Military-related cases that constitute political questions are limited to direct challenges to the institutional functioning of the military in such areas as the relationship between personnel, discipline, and training or challenges affecting the internal functioning and operation of the military.[5] Cases in which a member of the United States military is injured or killed as a result of the alleged negligence of a government defense contractor working with the military are barred by the political question doctrine if military decision making or policy would be a necessary inquiry inseparable from the claims asserted.[6] In addition, claims arising from war that require a court to evaluate the executive's military strategy, tactical decision making, or calculated operations are typically nonjusticiable political questions.[7]

Footnotes

1 Lin v. U.S., 561 F.3d 502 (D.C. Cir. 2009).
The political question doctrine restrains courts from reviewing an exercise of foreign policy judgment by the coordinate political branch to which authority to make that judgment has been constitutionally committed. In re Nazi Era Cases Against German Defendants Litigation, 129 F. Supp. 2d 370 (D.N.J. 2001).

2 Wultz v. Islamic Republic of Iran, 755 F. Supp. 2d 1 (D.D.C. 2010).

3 Lane v. Halliburton, 529 F.3d 548 (5th Cir. 2008); Defense Technology, Inc. v. U.S., 99 Fed. Cl. 103 (2011).
Whether a treaty remains valid following a change in the status of one of the signatories is a political question, and the court of appeals therefore defers to the views of each nation's executive branch. Hoxha v. Levi, 465 F.3d 554 (3d Cir. 2006).

4 Khouzam v. Attorney General of U.S., 549 F.3d 235 (3d Cir. 2008); Defense Technology, Inc. v. U.S., 99 Fed. Cl. 103 (2011).

5 McMahon v. Presidential Airways, Inc., 502 F.3d 1331, 24 A.L.R. Fed. 2d 729 (11th Cir. 2007).

6 Carmichael v. Kellogg, Brown & Root Services, Inc., 450 F. Supp. 2d 1373, 23 A.L.R. Fed. 2d 809 (N.D. Ga. 2006).

7 McMahon v. Presidential Airways, Inc., 502 F.3d 1331, 24 A.L.R. Fed. 2d 729 (11th Cir. 2007).

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VII. Departmental Separation of Governmental Powers

C. Judicial Powers

2. Limitations

a. In General

§ 272. Impermissibility of imposing nonjudicial functions upon judiciary

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 2355, 2450, 2500

One application of the general principle of separation of the powers of government is the rule that has itself been described by some authorities as a rudimentary principle of constitutional law, namely, that only judicial functions may be imposed on judges when acting in their judicial capacity.[1] The purpose of the general rule that executive or administrative duties of a nonjudicial nature cannot be imposed on Article III federal judges is to maintain the separation between the judiciary and the other branches of the government by ensuring the independence of the judicial branch and ensuring that judges do not encroach upon executive or legislative authority or undertake tasks that are more properly accomplished by the other branches.[2] However, the Federal Constitution does not prohibit Article III federal judges from undertaking extrajudicial duties on a voluntary or appointed basis. Thus, the Constitution does not impose an absolute bar on judges wearing two hats; it merely forbids them from wearing both hats at the same time.[3]

Footnotes

1 National Mut. Ins. Co. of Dist. of Col. v. Tidewater Transfer Co., 337 U.S. 582, 69 S. Ct. 1173, 93 L. Ed. 1556 (1949); Frazier v. Moffatt, 108 Cal. App. 2d 379, 239 P.2d 123 (2d Dist. 1951); Woodward v. Pearson, 165 Or. 40, 103 P.2d 737 (1940); Application of Nelson, 83 S.D. 611, 163 N.W.2d 533 (1968); State v. Huber, 129 W. Va. 198, 40 S.E.2d 11, 168 A.L.R. 808 (1946).

A provision of the North Dakota Constitution specifically prohibiting nonjudicial duties from being imposed on the state supreme court or any of its judges cannot be interpreted as silently implying that the district courts may exercise nonjudicial duties; the purpose of the provision is rather to ensure that neither the state supreme court nor its judges will be asked to render ex parte opinions. City of Carrington v. Foster County, 166 N.W.2d 377 (N.D. 1969).

2 Morrison v. Olson, 487 U.S. 654, 108 S. Ct. 2597, 101 L. Ed. 2d 569 (1988).

3 Mistretta v. U.S., 488 U.S. 361, 109 S. Ct. 647, 102 L. Ed. 2d 714 (1989) the separation of powers doctrine does not absolutely prohibit Article III federal judges from serving on the Federal Sentencing Commission.

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VII. Departmental Separation of Governmental Powers

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2. Limitations

b. Limitations with Regard to Executive Department

§ 273. Limitations of judiciary with regard to executive authority, generally; interference with executive powers

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 2450, 2540, 2550

A.L.R. Library

Construction and application, under state law, of doctrine of "executive privilege," 10 A.L.R.4th 355
Executive privilege with respect to presidential papers and recordings, 19 A.L.R. Fed. 472

Under the separation of powers doctrine, the judiciary is precluded from interfering with—much less usurping—the proper authority of, the executive[1] because the separation of powers doctrine mandates that the judiciary remain independent of executive affairs and vice versa.[2] In particular, encroachment cannot be accomplished by judicial review of purely executive powers.[3]

The courts have no authority to interfere in the performance of executive duties, particularly when the executive must exercise discretion in performing constitutional or statutory powers.[4] If the executive carries out a function that is part of the inherent executive power and for which there are no constitutional or other standards, the judiciary lacks authority to review executive

action.[5] Within the limits of the power conferred upon the governor by the constitution and the laws, the governor is not subject to control by the courts.[6]

The general rule that a court is without jurisdiction to judicially review the discretionary functions of the executive branch of government is, however, subject to the exception that a court is empowered to prevent a member of the executive branch from acting ultra vires, in bad faith, or arbitrarily.[7] Though a court has no direct power to review acts of executive discretion, it may hear challenges to those acts on the grounds that the executive acted unconstitutionally or otherwise violated the law.[8] Furthermore, the judicial branch of government has authority to assure that an agency of the executive branch of government performs its statutorily mandated duties.[9]

Judicial review to determine the constitutionality of the President's acts may be appropriate.[10] The separation of powers doctrine does not bar every exercise of jurisdiction over the President, but, before exercising jurisdiction, a court must balance the constitutional weight of the interest to be served against the dangers of intruding on the authority and functions of the executive branch.[11] However, if the President has complete discretion whether to take an action in the first place, courts lack authority to review the validity of an agency recommendation to the President regarding that action.[12] The grant of discretion to the President to make particular judgments forecloses judicial review of the substance of those judgments altogether.[13] There is no exclusive commitment to the President of the authority to determine the constitutionality of a statute, and the judicial branch appropriately exercises that authority, including in a case that adjudicates whether Congress or the President is aggrandizing its power at the expense of another branch.[14]

Observation:

Neither the doctrine of separation of powers, nor the need for the confidentiality of high-level communications, without more, can sustain an absolute, unqualified presidential privilege of immunity from judicial process under all circumstances.[15]

Footnotes

1 Sharrard v. State, 998 So. 2d 1188 (Fla. 4th DCA 2009).

2 U.S. v. Robertson, 45 F.3d 1423 (10th Cir. 1995).

3 U.S. ex rel. Knauff v. Shaughnessy, 338 U.S. 537, 70 S. Ct. 309, 94 L. Ed. 317 (1950).

4 Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 71 S. Ct. 624, 95 L. Ed. 817 (1951); Ainsworth v. Barn Ballroom Co., Inc, 157 F.2d 97 (C.C.A. 4th Cir. 1946); In re SRBA Case No. 39576, 128 Idaho 246, 912 P.2d 614 (1995); Harvey & Corky Corp. v. Erie County, 56 A.D.2d 136, 392 N.Y.S.2d 116 (4th Dep't 1977).
A court may not properly exercise the functions of the executive branch of state government. L.G.G. v. Department of Social Services, 429 Mass. 1008, 709 N.E.2d 1108 (1999).

5 Warda v. City Council of City of Flushing, 472 Mich. 326, 696 N.W.2d 671 (2005).

6 Barbour v. State ex rel. Hood, 974 So. 2d 232 (Miss. 2008).

7 Villines v. Lee, 321 Ark. 405, 902 S.W.2d 233 (1995).

8 Millineum Maintenance Management, Inc. v. County of Lake, 384 Ill. App. 3d 638, 323 Ill. Dec. 819, 894 N.E.2d 845 (2d Dist. 2008).

9 State for Use of Dept. of Corrections v. Pena, 911 P.2d 48 (Colo. 1996).

10 Utah Ass'n of Counties v. Bush, 316 F. Supp. 2d 1172, 11 A.L.R. Fed. 2d 917 (D. Utah 2004).

11 Nixon v. Fitzgerald, 457 U.S. 731, 102 S. Ct. 2690, 73 L. Ed. 2d 349 (1982).

12 Corus Group PLC. v. International Trade Com'n., 352 F.3d 1351 (Fed. Cir. 2003).

13 Utah Ass'n of Counties v. Bush, 316 F. Supp. 2d 1172, 11 A.L.R. Fed. 2d 917 (D. Utah 2004).

14 Zivotofsky ex rel. Zivotofsky v. Clinton, 566 U.S. 189, 132 S. Ct. 1421, 182 L. Ed. 2d 423, 75 A.L.R. Fed. 2d 637 (2012).

15 Clinton v. Jones, 520 U.S. 681, 117 S. Ct. 1636, 137 L. Ed. 2d 945 (1997).

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VII. Departmental Separation of Governmental Powers

C. Judicial Powers

2. Limitations

b. Limitations with Regard to Executive Department

§ 274. Particular executive actions not subject to judicial review

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 2540, 2541, 2543, 2544, 2545(1), 2545(2), 2545(4), 2549, 2551, 2553, 2560

A.L.R. Library

Construction and Application of 5 U.S.C.A. s701(b)(1)(G), 'Military Authority Exception' Under Administrative Procedure Act, 75 A.L.R. Fed. 2d 355

In accordance with the general rule that the judiciary will not encroach upon the executive branch of government,[1] the courts will not interfere with executive actions relating to executive,[2] political,[3] international,[4] prosecutorial,[5] military,[6] immigration,[7] internal revenue,[8] or law enforcement matters,[9] or with the executive's commutation of sentences.[10]

In addition, an assessment of the wisdom of an administrative agency's policy choices is a matter that is generally outside the purview of the judiciary.[11] The separation of powers doctrine may preclude a state's courts from passing judgment on administrative fiscal matters barring a specific challenge that is rooted in grounds of arbitrariness or capriciousness.[12]

Footnotes

1 § 273.

2 Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 71 S. Ct. 624, 95 L. Ed. 817 (1951); California State Employees' Assn. v. State of California, 32 Cal. App. 3d 103, 108 Cal. Rptr. 60 (3d Dist. 1973).

Under constitutional separation of powers, although the court may in appropriate circumstances review the governor's executive orders for compliance with the law, it is not the court's constitutional role to craft executive orders for the governor. Yes on Prop 200 v. Napolitano, 215 Ariz. 458, 160 P.3d 1216 (Ct. App. Div. 1 2007).

3 § 269.

4 Americans United for Separation of Church & State v. Reagan, 786 F.2d 194 (3d Cir. 1986) (the decision of the President of the United States to extend diplomatic relations to the Vatican is not subject to judicial review); Detroit International Bridge Company v. Government of Canada, 883 F.3d 895 (D.C. Cir. 2018), as amended on denial of reh'g, (Mar. 6, 2018) and cert. dismissed, 139 S. Ct. 378, 202 L. Ed. 2d 285 (2018) (international bridge).

Cases interpreting the broad textual grants of authority to the President and Congress in the areas of foreign affairs leave only a narrowly circumscribed role for the Judiciary. Corrie v. Caterpillar, Inc., 503 F.3d 974 (9th Cir. 2007).

5 U.S. v. Olvis, 97 F.3d 739 (4th Cir. 1996); State v. Cash, 558 N.W.2d 735 (Minn. 1997).

Substantial deference is ordinarily accorded to decisions requiring the exercise of prosecutorial discretion; those decisions are not subject to judicial review absent a showing of actual vindictiveness or an equal protection violation. U.S. v. Molina, 530 F.3d 326 (5th Cir. 2008).

Federal agencies' and officers' decisions not to prosecute are decisions unreviewable by the judicial branch, since the President is charged by the Constitution to take care that the laws are faithfully executed. Caldwell v. Kagan, 865 F. Supp. 2d 35 (D.D.C. 2012), aff'd summarily, 2013 WL 1733710 (D.C. Cir. 2013).

6 Knutson v. Wisconsin Air Nat. Guard, 995 F.2d 765 (7th Cir. 1993); Richenberg v. Perry, 97 F.3d 256 (8th Cir. 1996).

The Constitution vests the complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force exclusively in the legislative and executive branches. Nation v. Dalton, 107 F. Supp. 2d 37 (D.D.C. 2000).

7 Burrafato v. U.S. Dept. of State, 523 F.2d 554 (2d Cir. 1975).

Courts must give special deference to congressional and executive branch policy choices pertaining to immigration. State of Tex. v. U.S., 106 F.3d 661 (5th Cir. 1997).

8 Carmichael v. Southern Coal & Coke Co., 301 U.S. 495, 57 S. Ct. 868, 81 L. Ed. 1245, 109 A.L.R. 1327 (1937); Cincinnati Soap Co. v. U.S., 301 U.S. 308, 57 S. Ct. 764, 81 L. Ed. 1122 (1937).

The legislature and governor, not the state supreme court, should make the policy judgments that determine the scope of tax exemptions. Under the Rainbow Child Care Center, Inc. v. County of Goodhue, 741 N.W.2d 880 (Minn. 2007).

9 U.S. v. Fastow, 300 F. Supp. 2d 479 (S.D. Tex. 2004) (a court's discretion to deny leave to dismiss an indictment is limited by the separation of powers); Manchel v. Los Angeles County, 245 Cal. App. 2d 501, 54 Cal. Rptr. 53 (2d Dist. 1966).

10 State v. Wilson, 921 So. 2d 103 (La. 2006) (the trial court could not require a sentence for armed robbery to run without benefit of commutation); Moreau v. Fuller, 276 Va. 127, 661 S.E.2d 841 (2008) (the judiciary and the legislature may not assume a power of clemency or pardon that is a unique function of executive power).

11 NISH v. Cohen, 95 F. Supp. 2d 497 (E.D. Va. 2000), aff'd, 247 F.3d 197 (4th Cir. 2001).

A court that reassesses the credibility and reweighs the evidence, when reviewing an agency's decision, violates the constitutional separation of powers and calls into question the constitutionality of its acts. Bruder v. North Dakota Workforce Safety and Ins. Fund, 2009 ND 23, 761 N.W.2d 588 (N.D. 2009).

12 County Com'n of Greenbrier County v. Cummings, 228 W. Va. 464, 720 S.E.2d 587 (2011).

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VII. Departmental Separation of Governmental Powers

C. Judicial Powers

2. Limitations

c. Limitations with Regard to Legislative Department

§ 275. Limitations of judiciary with regard to legislative authority, generally; encroachment

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 2470

The separation of powers doctrine requires the judiciary to refrain from interfering with the legislative process.[1] The judiciary must not usurp the constitutional function of the legislature.[2] A statute potentially violates the separation of powers doctrine if it allows the judiciary to encroach on legislative functions or improperly delegates core legislative functions to the judiciary.[3]

When an issue involves a host of considerations that must be weighed and appraised, it should be committed to those who write the laws, rather than those who interpret them.[4] In particular, the respective merits of class actions and private arbitration as means of enforcing the law are questions constitutionally entrusted not to the courts to decide but to the policymakers in the political branches where those questions remain hotly contested.[5] Rules that aim to harmonize conflicts in statutory interpretation for federal statutes grow from an appreciation that it is the job of Congress by legislation, not the Supreme Court by supposition, both to write the laws and to repeal them.[6]

CUMULATIVE SUPPLEMENT

Cases:

Although a court might profoundly disagree with a particular statute or may even prefer another outcome, the judiciary is prohibited from substituting its judgment for that of the legislative branch, an action tantamount to improperly assuming the role of legislators; court must not violate that prohibition to reach a particular result in a particular case. State v. Smith, 844 S.E.2d 711 (W. Va. 2020).

[END OF SUPPLEMENT]

Footnotes

1 League of Arizona Cities and Towns v. Brewer, 213 Ariz. 557, 146 P.3d 58 (2006).
The right of a legislative body to exercise its legislative powers will not be invaded by the judicial branch of government. Brown v. Owen, 165 Wash. 2d 706, 206 P.3d 310 (2009).
The constitutional principle that legislative action cannot be coerced or restrained by the judicial process applies to legislative action of municipal governments. Town of Minturn v. Sensible Housing Co., Inc., 2012 CO 23, 273 P.3d 1154 (Colo. 2012).

2 Town of Porter v. Brandstetter, 770 N.E.2d 832 (Ind. Ct. App. 2002).
A court cannot substitute its judgment or usurp the prerogative of the legislature. Bauer v. State Employment Sec. Dept., 126 Wash. App. 468, 108 P.3d 1240 (Div. 3 2005).

3 State v. David, 134 Wash. App. 470, 141 P.3d 646 (Div. 2 2006).

4 Ziglar v. Abbasi, 137 S. Ct. 1843, 198 L. Ed. 2d 290 (2017).

5 Epic Systems Corp. v. Lewis, 138 S. Ct. 1612, 200 L. Ed. 2d 889 (2018).

6 Epic Systems Corp. v. Lewis, 138 S. Ct. 1612, 200 L. Ed. 2d 889 (2018).

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VII. Departmental Separation of Governmental Powers

C. Judicial Powers

2. Limitations

c. Limitations with Regard to Legislative Department

§ 276. Impermissible judicial legislation

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 2470, 2471, 2473 to 2476

As a judicial body, it is the court's role to interpret the laws as they are written,[1] and to construe and apply statutes as enacted.[2] It is not for the courts to supply missing words or sentences to a statute in order to clarify language that is indefinite or to supply missing language.[3] When courts stray from the plain language of a statute, they risk encroaching on the legislature's function to decide what the law should be.[4] When interpreting statutes, respect for Congress's prerogatives as policymaker means carefully attending to the words it chose rather than replacing them with others of the court's own choosing.[5] Thus, under the doctrine of separation of powers, courts may not, under the guise of interpretation,[6] legislate,[7] rewrite, or extend legislation.[8] Respect for the constitutional separation of powers counsels restraint in courts finding irreconcilable conflicts in statutes drafted by Congress, and allowing judges to pick and choose between statutes risks transforming them from expounders of what the law is into policymakers choosing what the law should be.[9] Reliance on context and structure in statutory interpretation is a subtle endeavor, calling for great wariness, otherwise what purports to be mere rendering becomes creation, and attempted interpretation of legislation becomes legislation itself.[10] Any extension of the reach of a statute to achieve a desired outcome must be accomplished by the legislature, not the courts.[11] Further, in the absence of some constitutional defect, a court is not at liberty to ignore a statute,[12] nor is it within the province of the courts to read a meaning into a statute that is not there or to read anything direct and plain out of a statute.[13]

It is not the province of a federal court to confer rights when the statutory language is silent or to engraft a remedy on a statute —no matter how salutary—that Congress did not intend to provide.[14] Thus, it is beyond a court's province to rescue Congress from its drafting errors and to provide for what it might think is the preferred result.[15]

CUMULATIVE SUPPLEMENT

Cases:

Courts must be careful in applying the absurdity doctrine so as to not substitute their judgment of how legislation should read, rather than how it does read, in violation of the separation of powers. Owens v. State, 303 So. 3d 993 (Fla. 1st DCA 2020).

[END OF SUPPLEMENT]

Footnotes

1 American Civil Rights Foundation v. Berkeley Unified School Dist., 172 Cal. App. 4th 207, 90 Cal. Rptr. 3d 789, 242 Ed. Law Rep. 285 (1st Dist. 2009).
As a general rule, when the terms of a statute are clear, its language is conclusive and courts are not free to replace that clear language with an un-enacted legislative intent. U.S. v. Hatcher, 560 F.3d 222 (4th Cir. 2009).
Laws passed by Congress and duly signed by the President are presumed constitutional; it is only in the rare instance when the dictates of a statute force a court to act in a manner that is otherwise not authorized by the Constitution that it will decline to act in the manner prescribed by Congress. In re Beck, 526 F. Supp. 2d 1291 (S.D. Fla. 2007).

2 Mazzacano v. Estate of Kinnerman, 197 N.J. 307, 962 A.2d 1103 (2009).

3 State v. Sosnowski, 17 Neb. App. 480, 764 N.W.2d 153 (2009).

4 ASAP Storage, Inc. v. City of Sparks, 123 Nev. 639, 173 P.3d 734 (2007); Gallagher Headquarters Ranch Development, Ltd. v. City of San Antonio, 269 S.W.3d 628 (Tex. App. San Antonio 2008).

5 Murphy v. Smith, 138 S. Ct. 784, 200 L. Ed. 2d 75 (2018); State ex rel. Moorehead v. Indus. Comm., 112 Ohio St. 3d 27, 2006-Ohio-6364, 857 N.E.2d 1203 (2006).

6 Kasserman and Bowman, PLLC v. Cline, 223 W. Va. 414, 675 S.E.2d 890 (2009).

7 Lewis Family Farm, Inc. v. Adirondack Park Agency, 22 Misc. 3d 568, 868 N.Y.S.2d 481 (Sup 2008), aff'd, 64 A.D.3d 1009, 882 N.Y.S.2d 762 (3d Dep't 2009); League of Women Voters of Wisconsin v. Evers, 2019 WI 75, 387 Wis. 2d 511, 929 N.W.2d 209 (2019).

8 Lewis Family Farm, Inc. v. Adirondack Park Agency, 22 Misc. 3d 568, 868 N.Y.S.2d 481 (Sup 2008), aff'd, 64 A.D.3d 1009, 882 N.Y.S.2d 762 (3d Dep't 2009).
Courts are not free to disregard the plain language of a statute and, instead, conjure up legislative purposes and intent out of thin air. Ruiz v. Bally Total Fitness Holding Corp., 496 F.3d 1, 48 A.L.R.6th 643 (1st Cir. 2007).
The state supreme court is not free to legislate, but rather, its task is limited to determining legislative intent when possible from the language used in the statute. Montana Food, LLC v. Todosijevic, 2015 WY 26, 344 P.3d 751 (Wyo. 2015).

9 Epic Systems Corp. v. Lewis, 138 S. Ct. 1612, 200 L. Ed. 2d 889 (2018).

10 King v. Burwell, 135 S. Ct. 2480, 192 L. Ed. 2d 483 (2015).

11 Patches v. Industrial Com'n of Ariz., 220 Ariz. 179, 204 P.3d 437 (Ct. App. Div. 1 2009).
The function of the courts is to interpret the law, not to legislate, regardless of how much judges might desire to do so or how worthy an argument. Olson v. Workforce Safety and Ins., 2008 ND 59, 747 N.W.2d 71 (N.D. 2008).

12 Williams v. State, 375 Md. 404, 825 A.2d 1078 (2003).
The court's belief that a particular result would be unreasonable may enter into the interpretation of ambiguous provisions of a statute but cannot justify disregard of what Congress has plainly and intentionally provided. U.S. v. Ninety Three Firearms, 330 F.3d 414, 56 Fed. R. Serv. 3d 209 (6th Cir. 2003).

13 State v. Stafford, 278 Neb. 109, 767 N.W.2d 507 (2009).
The omission of words from a statute is considered to be an intentional act by the legislature, and the state supreme court will not read words into a statute when the legislature has chosen not to include them. Kennedy Oil v. Department of Revenue, 2008 WY 154, 205 P.3d 999 (Wyo. 2008).

14 Spencer Bank, S.L.A. v. Seidman, 528 F. Supp. 2d 494 (D.N.J. 2008), judgment aff'd, 309 Fed. Appx. 546 (3d Cir. 2009).
Neither courts nor federal agencies can rewrite a statute's plain text to correspond to its supposed purpose. Landstar Exp. America, Inc. v. Federal Maritime Com'n, 569 F.3d 493 (D.C. Cir. 2009).
The United States Supreme Court's unwillingness to soften the import of Congress' chosen words even if the Court believes the words lead to a harsh outcome is longstanding, and is no less true in bankruptcy than it is elsewhere. Baker Botts L.L.P. v. ASARCO LLC, 576 U.S. 121, 135 S. Ct. 2158, 192 L. Ed. 2d 208 (2015).

15 U.S. v. Head, 552 F.3d 640 (7th Cir. 2009); In re Weiderhold, 381 B.R. 626 (Bankr. M.D. Pa. 2008).

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VII. Departmental Separation of Governmental Powers

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§ 277. Impermissible judicial legislation—Reformation to achieve constitutionality; invalidation, annulment, or repeal of statutes

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1026, 2470, 2473, 2478

Although courts ordinarily may not rewrite a clear and unambiguous statute to make it pass constitutional muster,[1] the judiciary is not authorized to correct an unconstitutional legislative statute by opinion.[2] However, to uphold a statute in the face of a constitutional challenge, a court may place a saving construction on the statute when this does not effectively rewrite the statute.[3] In at least one jurisdiction, however, a reviewing court may reform a statute to conform it to constitutional requirements in lieu of simply declaring it unconstitutional and unenforceable if (1) it is possible to reform the statute in a manner that closely effectuates policy judgments clearly articulated by the enacting body and (2) the court believes that the enacting body would have preferred such a reformed version of the statute to invalidation of the statute.[4]

The separation of powers doctrine requires a court to presume a statute to be constitutional,[5] and it is the duty of courts to give effect to legislative acts, not to amend, repeal, or circumvent them, and a court is not justified in ignoring the plain words of a statute.[6] Respect for the coequal branches of government requires courts to exercise great restraint before striking down a statute as unconstitutional, particularly when it involves a determination of what is a legislative and what is a judicial function.[7] The touchstone for any decision about the appropriate remedy for a constitutional flaw in a statute is legislative intent, as a court cannot use its remedial powers to circumvent the intent of the legislature.[8]

The lawmaking power is reposed in the people as reflected in the work of the legislature, and absent a constitutional violation the courts cannot overrule or otherwise nullify the people's representatives.[9] The canon of statutory construction regarding avoidance of constitutional questions applies when there is ambiguous statutory language, and courts should not employ that canon as a pretext for rewriting clear statutory language.[10]

Footnotes

1 State v. Dickerson, 142 Idaho 514, 129 P.3d 1263 (Ct. App. 2006); Martin v. Kansas Dept. of Revenue, 285 Kan. 625, 176 P.3d 938 (2008); State v. Frawley, 2007-NMSC-057, 143 N.M. 7, 172 P.3d 144 (2007).
The separation of powers doctrine prohibits courts from enacting legislation or redrafting patently defective statutes. Alaskans for a Common Language, Inc. v. Kritz, 170 P.3d 183 (Alaska 2007).

2 Florida Hosp. Trust Fund v. C.I.R., 71 F.3d 808 (11th Cir. 1996).

3 Florida Dept. Of Children And Families v. F.L., 880 So. 2d 602 (Fla. 2004).

4 Abbott Laboratories v. Franchise Tax Bd., 175 Cal. App. 4th 1346, 96 Cal. Rptr. 3d 864 (2d Dist. 2009), as modified, (Aug. 6, 2009).

5 People v. Montour, 157 P.3d 489 (Colo. 2007); State ex rel. Six v. Kansas Lottery, 286 Kan. 557, 186 P.3d 183 (2008); Baker v. Fletcher, 204 S.W.3d 589 (Ky. 2006).

6 Lang v. Erlanger Tubular Corp., 2009 OK 17, 206 P.3d 589 (Okla. 2009).

7 State v. Lemmer, 736 N.W.2d 650 (Minn. 2007).

8 Ayotte v. Planned Parenthood of Northern New England, 546 U.S. 320, 126 S. Ct. 961, 163 L. Ed. 2d 812 (2006).
Due respect for the decisions of a coordinate branch of government demands that the Supreme Court invalidate a congressional enactment only upon a plain showing that Congress has exceeded its constitutional bounds. U.S. v. Morrison, 529 U.S. 598, 120 S. Ct. 1740, 146 L. Ed. 2d 658, 144 Ed. Law Rep. 28 (2000).

9 Gauthier v. Alpena County Prosecutor, 267 Mich. App. 167, 703 N.W.2d 818 (2005).
When confronting a constitutional flaw in a statute, the Supreme Court tries not to nullify more of the legislature's work than is necessary, on the theory that a ruling of unconstitutionality frustrates the intent of the people's elected representatives. Ayotte v. Planned Parenthood of Northern New England, 546 U.S. 320, 126 S. Ct. 961, 163 L. Ed. 2d 812 (2006).

10 Harris v. Garner, 216 F.3d 970 (11th Cir. 2000).

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§ 278. Impermissible judicial legislation—Modification of common law

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 2471

It is the province of the legislature, and not the court, to modify the rules of the common law.[1] Altering common-law rights, creating new causes of action, and providing new remedies for wrongs is generally a legislative, not a judicial, function.[2]

Separation of powers concerns create a presumption in favor of preemption of federal common law whenever Congress has legislated on the subject.[3] Also, when there are sound reasons to think Congress might doubt the efficacy or necessity of a damages remedy as part of the system for enforcing the law and correcting a wrong, the courts must refrain from creating the remedy in order to respect the role of Congress in determining the nature and extent of federal-court jurisdiction under Article III.[4]

Footnotes

1 Moon v. North Idaho Farmers Ass'n, 140 Idaho 536, 96 P.3d 637 (2004).

2 Badillo v. American Brands, Inc., 117 Nev. 34, 16 P.3d 435 (2001).

3 U.S. v. Tenet Healthcare Corp., 343 F. Supp. 2d 922 (C.D. Cal. 2004).

4 Ziglar v. Abbasi, 137 S. Ct. 1843, 198 L. Ed. 2d 290 (2017).

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§ 279. Judicial acceptance of legislative classification

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 2483

Courts must accept a legislative classification even when there is an imperfect fit between means and ends.[1] Legislative classification becomes a judicial question only where the lines drawn appear arbitrary or manifestly unreasonable, and so long as the classification is based upon substantial distinctions with reference to the subject matter, courts will not substitute their judgment for that of the legislature.[2] Lawmakers' discretion in defining a class to which a law applies should be disturbed only when the created class is clearly arbitrary, unreasonable, and unjust.[3] In a world of limited resources, and with respect to separation of powers, courts accord deference to legislative and executive branch actors in constitutional, equal protection cases, and governmental actors are allowed to create a classification if it bears a reasonable relationship to a proper governmental purpose, but such deference is not afforded to a private, nongovernmental entity.[4]

Unless a statute employs a classification that is inherently invidious or that impinges on fundamental rights—areas in which the judiciary then has a duty to intervene in the democratic process—federal courts properly exercise only a limited review power over Congress.[5]

Footnotes

1 Masnauskas v. Gonzales, 432 F.3d 1067 (9th Cir. 2005).

2 Morrison v. Sadler, 821 N.E.2d 15 (Ind. Ct. App. 2005).

3 City of Sullivan v. Sites, 329 S.W.3d 691 (Mo. 2010).

4 Community Antenna Service, Inc. v. Charter Communications VI, LLC, 227 W. Va. 595, 712 S.E.2d 504 (2011).

5 In re Watson, 332 B.R. 740 (Bankr. E.D. Va. 2005).

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§ 280. Judicial inquiry into legislative judgment; creation of remedies

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 2480, 2486 to 2497, 2503(1)

Courts do not sit to determine the wisdom of statutes[1] or fashion remedies that Congress has specifically chosen not to extend.[2] The responsibility for the justice or wisdom of legislation rests exclusively with the legislature,[3] and a court must not question the reasonableness of a statute or substitute its own policy judgments for those of the legislature.[4] If a statute gives rise to undesirable results, the legislature must determine the remedy,[5] but to rewrite legislation in order to make it more fair or more reasonable transcends the judicial function.[6] Whether a statute is the best means to achieve the desired result is a matter left to the legislature.[7]

Other matters that are beyond the concern of the judiciary are the propriety or appropriateness of legislation,[8] and its necessity,[9] fairness,[10] and expediency.[11] Further, courts do not address questions relating to legislative policy[12] or motivation.[13] Also, it is not the judiciary's function to reweigh the legislative facts underlying a legislative enactment.[14]

Observation:

It is not the function of the judiciary to sit as a super-legislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines.[15]

Footnotes

1 Sims v. ACI Northwest, Inc., 157 Idaho 906, 342 P.3d 618 (2015); City of Davenport v. Seymour, 755 N.W.2d 533 (Iowa 2008); Pennyrile Allied Community Services, Inc. v. Rogers, 459 S.W.3d 339 (Ky. 2015), as modified, (Mar. 3, 2015); Com. v. Freeman, 472 Mass. 503, 36 N.E.3d 12 (2015); Groch v. Gen. Motors Corp., 117 Ohio St. 3d 192, 2008-Ohio-546, 883 N.E.2d 377 (2008).
Equal protection is not a license for courts to judge the wisdom, fairness, or logic of legislative choices. Planned Parenthood of Indiana and Kentucky, Inc. v. Commissioner, Indiana Dept. of Health, 64 F. Supp. 3d 1235 (S.D. Ind. 2014).

2 Landgraf v. USI Film Products, 511 U.S. 244, 114 S. Ct. 1483, 128 L. Ed. 2d 229 (1994).

3 Lawrence v. Regent Realty Group, Inc., 197 Ill. 2d 1, 257 Ill. Dec. 676, 754 N.E.2d 334 (2001); State v. Maestas, 2007-NMSC-001, 140 N.M. 836, 149 P.3d 933 (2006).

4 Wausau Ins. Co. v. Dorsett, 172 S.W.3d 538 (Tenn. 2005).

5 Department of Transp. v. City of Idaho Springs, 192 P.3d 490 (Colo. App. 2008).

6 District of Columbia v. Gould, 852 A.2d 50 (D.C. 2004).

7 Big Sky Excavating, Inc. v. Illinois Bell Telephone Co., 217 Ill. 2d 221, 298 Ill. Dec. 739, 840 N.E.2d 1174, 36 A.L.R.6th 783 (2005); Khan v. State Bd. of Auctioneer Examiners, 577 Pa. 166, 842 A.2d 936 (2004).

8 Wilfong v. Com., 175 S.W.3d 84 (Ky. Ct. App. 2004); Doll v. Barnell, 693 N.W.2d 455 (Minn. Ct. App. 2005) (courts cannot determine fairly debatable questions over a law's reasonableness, wisdom, and propriety); Graham v. Beverage, 211 W. Va. 466, 566 S.E.2d 603 (2002).

9 Driver v. Town of Richmond ex rel. Krugman, 570 F. Supp. 2d 269 (D.R.I. 2008); Le v. Lautrup, 271 Neb. 931, 716 N.W.2d 713 (2006); Caviglia v. Royal Tours of America, 178 N.J. 460, 842 A.2d 125 (2004); Ragsdale v. City of Memphis, 70 S.W.3d 56 (Tenn. Ct. App. 2001).

10 Continental Cas. Co. v. Ryan Inc. Eastern, 974 So. 2d 368 (Fla. 2008); Guzman ex rel. Losoya v. U S West, Inc., 667 N.W.2d 489 (Minn. Ct. App. 2003); Ragsdale v. City of Memphis, 70 S.W.3d 56 (Tenn. Ct. App. 2001).

11 Com. v. Freeman, 472 Mass. 503, 36 N.E.3d 12 (2015); Scheffel v. Krueger, 146 N.H. 669, 782 A.2d 410 (2001); Johnson ex rel. MAII Holdings, Inc. v. Jackson Walker, L.L.P., 247 S.W.3d 765 (Tex. App. Dallas 2008); State ex rel. Rist v. Underwood, 206 W. Va. 258, 524 S.E.2d 179 (1999).

12 Alabama Dept. of Transp. v. Williams, 984 So. 2d 1092 (Ala. 2007); Chambers v. Ormiston, 935 A.2d 956 (R.I. 2007); State v. Rutherford, 223 W. Va. 1, 672 S.E.2d 137 (2008).

13 Abilene Retail No. 30, Inc. v. Board of Com'rs of Dickinson County, Kan., 492 F.3d 1164 (10th Cir. 2007); County of San Diego v. State of California, 164 Cal. App. 4th 580, 79 Cal. Rptr. 3d 489 (4th Dist. 2008); Village of Winslow v. Sheets, 261 Neb. 203, 622 N.W.2d 595 (2001).

14 In re Marriage of Burkle, 135 Cal. App. 4th 1045, 37 Cal. Rptr. 3d 805 (2d Dist. 2006), as modified, (Feb. 1, 2006); Gourley ex rel. Gourley v. Nebraska Methodist Health System, Inc., 265 Neb. 918, 663 N.W.2d 43 (2003).
Congressional fact-finding is reviewed under a deferential standard. Gonzales v. Carhart, 550 U.S. 124, 127 S. Ct. 1610, 167 L. Ed. 2d 480, 20 A.L.R. Fed. 2d 673 (2007).

15 Van Der Linde Housing, Inc. v. Rivanna Solid Waste Authority, 507 F.3d 290 (4th Cir. 2007); Subcarrier Communications, Inc. v. Nield, 218 W. Va. 292, 624 S.E.2d 729 (2005).

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§ 281. Setting public policy as outside scope of judicial function

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 2488

A fundamental principle of the constitutional separation of powers among the three branches of government is that the legislative branch is the ultimate arbiter of public policy.[1] Thus, the determination of public policy lies almost exclusively with the legislature,[2] and courts will not interfere with that determination in the absence of palpable errors.[3] A court must interpret and apply statutes in the manner in which they are written and cannot rewrite them to comport with the court's notions of orderliness and public policy.[4] A federal court cannot overrule Congress's judgment based on its own policy views.[5]

Footnotes

1 Hicks v. State, 153 So. 3d 53 (Ala. 2014); Arbino v. Johnson & Johnson, 116 Ohio St. 3d 468, 2007-Ohio-6948, 880 N.E.2d 420 (2007).

2 Knight v. Superior Court, 128 Cal. App. 4th 14, 26 Cal. Rptr. 3d 687 (3d Dist. 2005); Woods v. Com., 142 S.W.3d 24 (Ky. 2004) (the establishment of public policy is not within the authority of the courts; it is granted to the legislature alone); Westchester Fire Ins. Co. v. Admiral Ins. Co., 152 S.W.3d 172 (Tex. App. Fort Worth 2004) (generally, the legislature determines public policy).

3 Finley v. Astrue, 372 Ark. 103, 270 S.W.3d 849 (2008).

It is the particular domain of the legislature, as the voice of the people, to make public policy; elected executive officials and executive agencies also make policy, to a lesser extent, as authorized by the constitution or the legislature, but the judiciary is not as directly and politically responsible to the people as are the legislative and executive branches of government and should make policy only when the body politic has not spoken, and only with the understanding that any misperception of the public mind may be soon corrected by the legislature. Hartford Ins. Co. v. Cline, 2006-NMSC-033, 140 N.M. 16, 139 P.3d 176 (2006).

4 Roselle Police Pension Bd. v. Village of Roselle, 232 Ill. 2d 546, 328 Ill. Dec. 942, 905 N.E.2d 831 (2009).

5 SCA Hygiene Products Aktiebolag v. First Quality Baby Products, LLC, 137 S. Ct. 954, 197 L. Ed. 2d 292 (2017).

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§ 282. Interfering with legislative function as outside scope of judicial function

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 2470, 2532

The courts have no authority to interfere with or control the exercise by the legislature of the power belonging exclusively to that department.[1] This rule is equally applicable to the adoption of county and municipal ordinances.[2] Courts may not interfere with any exercise of the legislative prerogative within constitutional limits or with the lawful exercise of administrative authority or discretion.[3] Courts generally consider that the legislature's adherence to the rules or statutes prescribing procedure is a matter entirely within legislative control and discretion, and is not subject to judicial review unless the legislative procedure is mandated by the constitution.[4] Accordingly, courts are reluctant to inquire into whether the legislature has complied with legislatively prescribed formalities in enacting a statute.[5] Courts typically do not examine the process the legislature follows in adopting statutes when statutes are challenged, and courts will not tell the legislature when to meet, what its agenda should be, what it should submit to the people, what bills it may draft, or what language it may use.[6]

A request that the court enjoin conduct by the legislature generally entails an improper intrusion into legislative affairs, but a request for a declaratory judgment that an action is unconstitutional may be addressed by the court.[7]

Footnotes

1 Old Dearborn Distributing Co. v. Seagram-Distillers Corporation, 299 U.S. 183, 57 S. Ct. 139, 81 L. Ed. 109, 106 A.L.R. 1476 (1936).

2 Wilson v. Superior Court, 194 Cal. App. 3d 1259, 240 Cal. Rptr. 131 (6th Dist. 1987); Blackwell v. City of Philadelphia, 546 Pa. 358, 684 A.2d 1068 (1996); City of Houston v. Houston Gulf Coast Bldg., 697 S.W.2d 850 (Tex. App. Houston 1st Dist. 1985).

Generally, a court lacks the authority to interfere with purely legislative action, and when the legislature has committed to a municipal body the power to legislate on a given subject, the court has no authority to command or prohibit the exercise of the legislative function. County of Orange v. Barratt American, Inc., 150 Cal. App. 4th 420, 58 Cal. Rptr. 3d 542 (4th Dist. 2007).

3 South Easton Neighborhood Association, Inc. v. Town Of Easton, Maryland, 387 Md. 468, 876 A.2d 58 (2005).

4 Hughes v. Speaker of the New Hampshire House of Representatives, 152 N.H. 276, 876 A.2d 736 (2005).

5 Donaldson v. Bd. of Com'rs of Rock-Koshkonong Lake Dist., 2004 WI 67, 272 Wis. 2d 146, 680 N.W.2d 762 (2004).

6 Arizona Minority Coalition for Fair Redistricting v. Arizona Independent Redistricting Com'n, 220 Ariz. 587, 208 P.3d 676 (2009).

7 Grossman v. Dean, 80 P.3d 952 (Colo. App. 2003).

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§ 283. Intrusion into military-affairs legislation by judiciary

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 2501

The United States Constitution vests the complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force exclusively in the legislative and executive branches,[1] and judicial deference to Congressional enactments is greatest when Congress legislates under its authority to raise and support armies.[2] The fact that legislation that raises armies is subject to First Amendment constraints does not mean that the court ignores the purpose of the legislation when determining its constitutionality.[3]

Not all cases involving the military are foreclosed by the political question doctrine.[4] Heightened judicial deference to Congress in military matters does not mean that Congress operates free of all constitutional restraint when legislating in that area or that the courts have a license to avoid deciding constitutional questions posed by litigants,[5] but judicial deference when reviewing congressional decision making in military matters is nonetheless essential.[6]

Footnotes

1 Nation v. Dalton, 107 F. Supp. 2d 37 (D.D.C. 2000).

The Constitution emphatically confers authority over the military upon the executive and legislative branches of the federal government. American K-9 Detection Services, LLC v. Freeman, 556 S.W.3d 246 (Tex. 2018), cert. denied, 139 S. Ct. 1344, 203 L. Ed. 2d 570 (2019).

2 Rumsfeld v. Forum for Academic and Institutional Rights, Inc., 547 U.S. 47, 126 S. Ct. 1297, 164 L. Ed. 2d 156, 206 Ed. Law Rep. 819 (2006); Cook v. Rumsfeld, 429 F. Supp. 2d 385 (D. Mass. 2006), judgment aff'd, 528 F.3d 42, 40 A.L.R. Fed. 2d 679 (1st Cir. 2008).

3 Rumsfeld v. Forum for Academic and Institutional Rights, Inc., 547 U.S. 47, 126 S. Ct. 1297, 164 L. Ed. 2d 156, 206 Ed. Law Rep. 819 (2006).

4 American K-9 Detection Services, LLC v. Freeman, 556 S.W.3d 246 (Tex. 2018), cert. denied, 139 S. Ct. 1344, 203 L. Ed. 2d 570 (2019).

5 Able v. U.S., 88 F.3d 1280 (2d Cir. 1996) (dealing with military service by gays and lesbians).

In the area of military affairs, Congress remains subject to the limitations of the Due Process Clause. United States v. Begani, 79 M.J. 767 (N.M.C.C.A. 2020).

6 Able v. U.S., 88 F.3d 1280 (2d Cir. 1996).

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§ 284. Compelling enactment of legislation as outside scope of judicial function

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West's Key Number Digest

West's Key Number Digest, Constitutional Law 2470, 2473, 2532
West's Key Number Digest, Mandamus 73(1)

Although courts are authorized to interpret and declare the law, the judicial branch has no authority to direct a legislative body to enact legislation[1] or supervise the making of laws.[2] Thus, the courts may not force the legislatures to enact legislation by mandamus[3] or on behalf of private litigants.[4] Also, unlike an administrative agency's denial of an exemption from a generally applicable law, which would be entitled to a judicial review, a legislature's failure to enact a special law is itself unreviewable by the courts.[5] A separation of powers does allow for some incidental overlap of function, but a judicially compelled enactment of legislation is not an incidental overlap; it is the very exercise of legislative authority itself.[6]

Footnotes

1 Marriott v. Chatham County, 187 N.C. App. 491, 654 S.E.2d 13 (2007).

2 League of Women Voters of Wisconsin v. Evers, 2019 WI 75, 387 Wis. 2d 511, 929 N.W.2d 209 (2019).

3 City of Sacramento v. California State Legislature, 187 Cal. App. 3d 393, 231 Cal. Rptr. 686 (3d Dist. 1986).

4 Pennsylvania State Ass'n of County Com'rs v. Com., 545 Pa. 324, 681 A.2d 699 (1996) (litigants may not sue in court to compel the legislature to enact a law).

5 Board of Educ. of Kiryas Joel Village School Dist. v. Grumet, 512 U.S. 687, 114 S. Ct. 2481, 129 L. Ed. 2d 546, 91 Ed. Law Rep. 810 (1994).
The judiciary does not have the authority to order the general assembly to convene, consider issues, or enact specific legislation. Beauprez v. Avalos, 42 P.3d 642 (Colo. 2002).

6 County of San Diego v. State of California, 164 Cal. App. 4th 580, 79 Cal. Rptr. 3d 489 (4th Dist. 2008).

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